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IN THE

Supreme Court of the United States

SUMITOMO CORPORATION OF AMERICA, SUMITOMO CORPORATION and SUMITOMO CORPORATION FUTURES, INC.,

Petitioners,

—v.—

OCEAN VIEW CAPITAL, INCORPORATED, formerly known as TRIANGLE WIRE & CABLE, INCORPORATED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the court of appeals erred in creating an exception to the direct purchaser rule of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) to allow Ocean View to maintain overcharge claims for purchases it did not make from the defendants simply because the overcharge allegedly originated from a market manipulation.

Whether the court of appeals erred in concluding that Ocean View had antitrust standing under *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), despite the fact that permitting Ocean View to sue would entangle the trial court in a complex apportionment exercise to avoid duplicative recoveries, the relationship between prices in the allegedly manipulated market and the market where the alleged harm was suffered was not sufficiently direct and Ocean View's damages are speculative.

PARTIES TO THE PROCEEDING

Petitioners are Sumitomo Corporation of America, Sumitomo Corporation and Sumitomo Corporation Futures, Inc. Respondent is Ocean View Capital, Inc., f/k/a Triangle Wire & Cable, Inc. The other remaining defendants named in the amended complaint are Global Minerals and Metals Corporation, David Campbell, Credit Lyonnais Rouse and Yasuo Hamanaka.

RULE 29.6 DISCLOSURE

Sumitomo Corporation is the parent corporation of Sumitomo Corporation of America and Sumitomo Corporation Futures, Inc. Sumitomo Corporation owns 10% or more of Sumitomo Corporation of America's and Sumitomo Corporation Futures, Inc.'s stock.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
RULE 29.6 DISCLOSURE	ii
TABLE OF AUTHORITIES	v
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED	1
STATEMENT OF THE CASE	2
A. The District Court Litigation	2
B. The Court of Appeals' Decision	5
REASONS FOR GRANTING THE PETITION	7
A. The Panel's Decision Conflicts with *Illinois Brick*	8

PAGE

B. The Panel's Decision Conflicts With Decisions of the Third and Ninth Circuits Rejecting "Umbrella Standing" 14

C. The Panel Misinterpreted The *AGC* Standing Test 16

CONCLUSION 22

TABLE OF AUTHORITIES

Federal Cases PAGE

Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983) ..... *passim*

Blue Shield of Virginia v. McCready, 457 U.S. 465 (1982) 9, 15

In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 691 F.2d 1335 (9th Cir. 1982) 15

Hanover Shoe, Inc. v. United Shoe Machine Corp., 392 U.S. 481 (1968) 5, 11

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) ..... *passim*

Kansas v. Utilicorp United, Inc., 497 U.S. 199 (1990) ..... *passim*

Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) 15

Mid-West Paper Products Co. v. Continental Group, Inc., 596 F.2d 573 (3d Cir. 1979) ... 15

Ocean View Capital, Inc. v. Sumitomo Corp. of America, 98 F. Supp. 2d 1039 (W.D. Wis. 2000) 4

Ocean View Capital, Inc. v. Sumitomo Corp. of America, 1999 U.S. Dist. LEXIS 19194 (S.D.N.Y. Dec. 15, 1999) 4

PAGE

In re Sugar Industry Antitrust Litigation, 579 F.2d 13 (3d Cir. 1978) 13

Other Cases

In re Sumitomo Corp., CFTC Docket No. 98-14, 1998 WL. 236520 (May 11, 1998) 2-3

Federal Statutes

28 U.S.C. § 1254(1) 1

15 U.S.C. § 15(a) 1-2

Miscellaneous

Philip E. Areeda & Herbert Hovenkamp, II *Antitrust Law* 360 (Rev. Ed. 1995) 18

PETITION FOR WRIT OF CERTIORARI

Sumitomo Corporation of America, Sumitomo Corporation and Sumitomo Corporation Futures, Inc. (collectively, "Sumitomo") hereby petition this Court to issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court appeals is reported at 306 F.3d 469 (7th Cir. 2002), and is set forth in the Appendix ("App.") at App. 1a-52a. The order of the court of appeals denying the petitions for rehearing is dated January 30, 2003, and is set forth at App. 53a-54a. The opinion of the United States District Court for the Western District of Wisconsin granting the motion for summary judgment is reported at 153 F. Supp.2d 996 (W.D. Wis. 2001), and is set forth at App. 55a- 89a.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on September 20, 2002, and denied the petitions for rehearing on January 30, 2003. This Court has jurisdiction to review this petition under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Section 4 of the Clayton Act, 15 U.S.C. § 15(a), provides, in relevant part:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the

defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

A. The District Court Litigation

This case arises out of a rogue copper trading scheme by a former employee of Sumitomo, which allegedly included an attempt to manipulate copper prices on the London Metals Exchange (the "LME"). As a result of this scheme, Sumitomo suffered $2.6 billion in trading losses. Sumitomo also entered into a settlement with the Commodity Futures Trading Commission (the "CFTC") whereby Sumitomo paid $150 million to the CFTC, including a civil monetary penalty of $125 million and $25 million for private claimants. *In re Sumitomo Corp.*, CFTC Docket No. 98-14, 1998 WL 236520 at *8-9 (May 11, 1998) (the "CFTC Order"). Sumitomo has also been sued in numerous private actions, including cases brought by a plaintiff who traded on the LME and by a group of traders on the Commodities Exchange Division of the New York Mercantile Exchange ("Comex"). The rogue trader is now in prison in Japan.

Ocean View, a purchaser of copper in the cash market, originally sued Sumitomo and others in the District Court for the Southern District of New York.[1] Ocean View's claims are not premised on purchases from Sumitomo (or any other defendant), and Ocean View did not trade on any exchange. Rather, Ocean View alleges it

[1] Jurisdiction was based on 28 U.S.C. §§ 1331 and 1337, as well as principles of supplemental jurisdiction under 28 U.S.C. § 1367(a).

was damaged because of a three-step chain of causation whereby a manipulation of futures prices on the LME affected futures prices on Comex, which in turn affected the prices Ocean View paid for copper rod, because those purchases were set by reference to prices on Comex.[2]

Copper rod, the primary form of copper purchased by Ocean View, is fabricated from copper cathode. During the relevant period, most cathode in the United States was refined through a three-step process. First, copper ore was removed from a mine and crushed into copper concentrate. Second, concentrate (and scrap copper) was smelted into anode or blister. Third, anode and blister were refined into cathode. Copper rod was then fabricated from copper cathode. All forms of physical copper are bought and sold at prices set by reference to the price of copper futures on Comex and/or the LME.

Ocean View's amended complaint does not allege any manipulative activity on Comex. Instead, it relies primarily on the CFTC Order, which also contains no allegation of wrongdoing on Comex. Rather, the CFTC found that Sumitomo's copper trader manipulated prices on the LME by hoarding LME copper warrants, taking large positions in LME copper futures, and entering into unnecessary supply contracts at prices indexed to LME prices. CFTC Order at *4-5. The CFTC further found that Comex prices were inflated because of arbitrage between the two exchanges and because high prices on the LME drew physical copper from Comex warehouses to LME warehouses. *Id.*, at *5.

Ocean View filed this action in the Southern District of New York. On January 29, 1999, defendants moved to

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[2] Ocean View made certain *de minimis* purchases from Sumitomo Corporation of America, but these purchases are not the predicate for its claims. App. 73a and 87a-88a.

dismiss. On December 15, 1999, the New York court granted the motion, finding that Ocean View's alleged harm was only indirectly related to the alleged misconduct and its alleged damages were too speculative. *Ocean View Capital, Inc. v. Sumitomo Corp. of America*, 1999 U.S. Dist. LEXIS 19194 (S.D.N.Y. Dec. 15, 1999). Before the dismissal order was entered, however, the Judicial Panel on Multidistrict Litigation consolidated the *Ocean View* action with another case that had been filed in the Western District of Wisconsin, and transferred the *Ocean View* action to that court, which vacated the New York court's decision and denied Sumitomo's renewed motion to dismiss. *Ocean View Capital, Inc. v. Sumitomo Corp. of America*, 98 F. Supp.2d 1039 (W.D. Wis. 2000).

The parties then conducted discovery on the issue of antitrust standing, and Sumitomo moved for summary judgment on the grounds that Ocean View lacked standing under this Court's decisions in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) and *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983) ("*AGC*"). Faced with the obvious problem that it was not a direct purchaser under *Illinois Brick*, Ocean View argued that so long at it was the "first purchaser" of copper cathode (or rod) whose price had been inflated as a result of Sumitomo's conduct, it could recover for purchases from non-defendants.

The district court rejected Ocean View's attempt to evade the clear mandate of *Illinois Brick*. It held that "there is no support in the case law for plaintiff's theory of the first purchaser as the equivalent of the direct purchaser under *Illinois Brick*." App. 81a. It rejected Ocean View's attempt to "adapt its claim to the concept of 'umbrella standing' relied upon in *Sanner v. Board of*

Trade, 62 F.3d 918 (7th Cir. 1995)." *Id.* And it found that Ocean View's attempt to circumvent the direct purchaser rule would require a complex exercise to determine how much of the alleged overcharge was passed on as copper moves along the chain of production and distribution, because all of these transactions are generally priced by reference to Comex. The court concluded that this was foreclosed by this Court's rulings in *Hanover Shoe, Inc. v. United Shoe Machine Corp.*, 392 U.S. 481 (1968), which held that a defendant may not seek to avoid (or minimize) liability for price-fixing by arguing that the plaintiff "passed on" the overcharge in its own sales of the product, and *Illinois Brick*, which held that the bar on a pass on defense must go hand-in-hand with limiting price-fixing suits to direct purchasers. App. 77a-78a.

B. The Court of Appeals' Decision

The court of appeals reversed. In so doing, it held that "*Illinois Brick* does not stand for the proposition . . . that a defendant cannot be sued under the antitrust laws by any plaintiff to whom it does not sell . . ." App. 16a. Rather, the panel interpreted *Illinois Brick* to stand for the much narrower proposition that a plaintiff who purchases a product originally sold by the defendant to a middleman lacks standing to raise a claim. App. 17a ("[t]he reason the plaintiffs' suit in *Illinois Brick* failed was *not* because the defendants did not sell to them. Rather, it was because the defendants *did* sell to a third party . . . who could recover for any injury they claimed") (emphasis in original). Based on this narrow reading, the panel discarded *Illinois Brick's* direct purchaser rule in favor of the "first purchaser rule" advocated by Ocean View.

Having read the "direct" requirement out of *Illinois Brick's* direct purchaser test and replaced it with a

requirement that plaintiff be the "first purchaser" of the product that was the target of the alleged manipulation—in this case, cathode—the panel expanded its new test even further by permitting Ocean View to recover for its first purchases of copper rod, even though rod was not the target of the alleged manipulation. As the panel acknowledged, "the physical market transaction at the heart of the defendants' scheme [was] the purchase of cathode." App. 33a and 43a-44a. And, unlike cathode, rod is not traded on the LME or Comex. Rather, rod is manufactured from cathode by both producers of cathode and semi-fabricators.

The panel further concluded that, at the summary judgment stage, Ocean View met the standing requirements of *AGC*. Thus, despite the fact that (a) Ocean View's alleged injury was felt in a market (the cash market) two steps removed from the market in which Sumitomo's manipulative trading activity took place (the LME), (b) there was no evidence of manipulative conduct on Comex and (c) LME prices diverge from Comex prices for days, week or even months at a time, the panel concluded that Ocean View's injury was sufficiently direct under *AGC*. And, even though Sumitomo allegedly devised the scheme to profit from its *own* cash market sales (App. 8a), the panel concluded that Ocean View—which did not buy cathode from Sumitomo—was the best situated plaintiff to maintain this action. Finally, the panel concluded that evidence that Ocean View's claim would duplicate the claims of parties in the futures market did not bar suit. Rather, it directed the district court and the parties to engage in a six year, trade-by-trade analysis to determine the extent of duplication, after which damages would be apportioned (by reducing Ocean View's claim) to eliminate that duplication.

REASONS FOR GRANTING THE PETITION

In *Illinois Brick*, this Court established a hard and fast rule of antitrust standing for price-fixing cases: the ***only*** persons who can sue are those who purchase the allegedly overpriced product from the defendant. In *Illinois Brick* and again in *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199 (1990), this Court made clear that the "direct purchaser" rule is to be strictly applied. Courts are not to make case-by-case determinations of whether the policies underlying *Illinois Brick* apply in a given situation. Yet this is precisely what the panel did here. Motivated by its desire not to allow an alleged scheme that was "*so* evil . . . and caused *so* much economic loss throughout the cash market" to go unpunished ((App. 40a) (emphasis in original)), it created an exception to *Illinois Brick* for cases where the overcharge results from an alleged market manipulation. In so doing, the panel adopted the doctrine of "umbrella standing," which two other circuit courts, adhering to the clear mandate of *Illinois Brick*, have rejected. The petition should be granted to correct this error, resolve the conflict and make clear—again—that this Court meant what it said in *Illinois Brick* and *Utilicorp*.

The panel also so fundamentally misinterpreted the *AGC* standing test as to turn market manipulation cases into complex exercises in apportioning overcharges suffered by persons in different markets and/or at different levels of a chain of distribution. The petition should be granted to make clear that, as this Court has previously stated, this line of inquiry is off-limits.

The panel's decision creates a rule of law that a party who manipulates a commodities futures market is liable for every purchase and sale of that commodity in the physical market. The panel's decision will transform the

treble damages sanction from a tool for enforcement into a tool of destruction in market manipulation cases. Indeed, Sumitomo has already paid hundreds of millions of dollars to settle claims brought by futures market traders and by indirect purchasers under state laws permitting such claims. It was also subject to suit by direct purchasers. The panel's desire not to grant Sumitomo a "pass under the antitrust laws" (App. 40a), and the manner in which it ignored this Court's mandate in order to punish Sumitomo, was unwarranted as a matter of law and unnecessary as a matter of fact.

A. The Panel's Decision Conflicts with *Illinois Brick*

In *Illinois Brick*, plaintiffs sued manufacturers and distributors of concrete block for alleged overcharges in the price of that block. The plaintiffs, however, had not purchased the block from the defendants. Instead, they alleged the blocks had been sold to subcontractors and used in buildings that were sold to plaintiffs. This Court rejected plaintiff's claim, and held that a purchaser seeking to recover an overcharge may not maintain an antitrust claim against a defendant from whom it did not purchase the allegedly overpriced product. *Illinois Brick*, 431 U.S. at 728-729. This Court recognized that its ruling might bar recovery by persons injured by an antitrust conspiracy, but identified two overriding policy concerns that precluded plaintiffs from using the antitrust laws to recover for such injury.

First, the Court reasoned that allowing indirect as well as direct purchasers to recover damages "would create a serious risk of multiple liability for defendants." *Illinois Brick*, 431 U.S. at 730. As the Court later explained, its decision in *Illinois Brick* "focused on the risk of duplicative recovery engendered by allowing every person along a chain of distribution to claim damages arising

from a single transaction that violated the antitrust laws." *Blue Shield of Va. v. McCready*, 457 U.S. 465, 474-75 (1982).

Second, the Court was concerned that permitting plaintiffs at multiple levels of a distribution chain to sue for alleged overcharges resulting from the same wrongdoing would burden the courts with the enormously complex task of attempting to apportion damages among parties at each level of distribution, thereby undermining effective enforcement of the antitrust laws. *Illinois Brick*, 431 U.S. at 735, 740-42. Permitting indirect purchaser claims:

> would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge—from direct purchasers to middlemen to ultimate consumers. However appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness.

Id., at 737. *See also Kansas v. Utilicorp United, Inc.*, 497 U.S. 199, 208 (1990) (direct purchaser rule "serves, in part, to eliminate the complications of apportioning overcharges between direct and indirect purchasers.")

This Court has made clear that the direct purchaser rule is to be strictly enforced and has rejected efforts to create exceptions to *Illinois Brick*:

> [E]ven assuming that any economic assumptions underlying the *Illinois Brick* rule might be disproved in a specific case, we think it an unwarranted and counterproductive exercise to litigate a series of exceptions. Having stated the rule in

> *Hanover Shoe*, and adhered to it in *Illinois Brick*, we stand by our interpretation of § 4.

Utilicorp, 497 U.S. at 216-217. In *Utilicorp*, natural gas producers and a pipeline company allegedly conspired to artificially inflate the price of natural gas sold to public utilities, which passed the entire overcharge on to residential customers by means of various rate-making regulations. The plaintiffs argued that consumers should be given standing because, in the context of regulated public utilities that pass on 100 percent of their costs, the policies underlying *Illinois Brick* did not apply. *Utilicorp*, 497 U.S. at 207-208. They also claimed they could prove the "exact injury" to consumers because the defendants made public filings showing the volume and price of the gas they sold. *Id.*, at 208.

This Court refused to adopt an exception to *Illinois Brick*, even though the consumers had clearly been injured by the conspiracy. It noted that its decisions in *Illinois Brick* and *Hanover Shoe* "often deny relief to consumers who have paid inflated prices because of their status as indirect purchasers." *Id.*, at 211-212. Recognizing the rationale of those cases "will not apply with equal force in all cases," this Court concluded that "[t]he possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule." *Id.*, at 216.

The panel ignored this clear mandate. It created a new rule, under which cases involving alleged market manipulations that impact the prices of commodities which are bought and sold along a chain of distribution are exempt from the direct purchaser rule. Nothing in *Illinois Brick* supports this exception. In fact, it flies in the face of *Utilicorp's* instruction that application of the direct purchaser rule is ***not*** subject to a case-by-case analysis of the economics of the allegedly manipulated market.

The panel's decision is a textbook illustration of the danger of creating exceptions to *Illinois Brick*. By venturing down the slippery slope of crafting an exception to the direct purchaser rule, the panel opened the door to complex questions of apportionment which *Illinois Brick* avoids. The panel fell into this quagmire by failing to recognize—and respect—the interrelationship between *Illinois Brick* and another of this Court's seminal cases on the subject of antitrust standing, *Hanover Shoe*.

In *Hanover Shoe*, a manufacturer of shoe-making equipment was sued by a shoe manufacturer, who alleged that it had to pay more for the equipment as a result of the defendant's policy of leasing (but refusing to sell) the equipment. The defendant sought to reduce its liability by demonstrating that the plaintiff passed on any increased costs by raising the price of the shoes it sold. The Court rejected this argument because it did not want to entangle the courts in complex issues regarding the amount of the pass on.

Illinois Brick presented the flip side of *Hanover Shoe*—whether persons who did not purchase from the defendant could sue on the theory that the overcharge had been passed on to them by previous purchasers. This Court made clear that these issues are inextricably intertwined. If only persons who purchase from the defendant can sue to recover for an unlawful overcharge, the issue of whether the purchaser passed on the overcharge may not be raised. If, however, persons who purchase from someone other than the defendant can sue—as the panel permitted Ocean View to do—then the defendant may argue that the plaintiff passed all or part of the overcharge on to a subsequent purchaser. "[W]hatever rule is to be adopted regarding pass-on in antitrust damages actions, it must apply equally to plaintiffs and defendants." *Illinois Brick*, 431 U.S. at 728. This Court chose

to adhere to its ruling in *Hanover Shoe*, holding that only direct purchasers may sue, and defendants may not argue that the plaintiff passed on any overcharge it paid to its customers.

The undisputed evidence here was that Comex—the index used for Ocean View's purchases—was the "overriding factor that affected the market price of [Ocean View's] end products on a day-to-day basis." App. 73a. Ocean View—with varying degrees of success—passed on increases in the cost of the copper it purchased to its customers. D.E. 316 (Defendants' Proposed Findings of Fact ("DPFF") ¶¶ 145-146). Indeed, in some years its gross profits actually *increased* as a result of the increase in copper prices allegedly engineered by Sumitomo. *Id.*

By abandoning *Illinois Brick*, the panel necessarily removed the *Hanover Shoe* bar on the introduction of evidence of pass on. On remand, the district court will have to analyze Ocean View's sales of copper products to determine the extent to which Ocean View passed on any overcharges. The panel thus opened the door to precisely the analysis that *Illinois Brick* and *Hanover Shoe* foreclose. *Utilicorp* warns against creating exceptions to *Illinois Brick*, because "[t]he possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule." *Utilicorp*, 497 U.S. at 216. The panel's failure to heed this warning must be corrected.

The panel's decision illustrates another danger posed by creating exceptions to *Illinois Brick*. Having opened the door to the "first purchaser" exception based on its review of the record in a related case before it (*Viacom Incorporated v. Global Minerals*, No. 01-3485), where the plaintiffs purchased cathode, the panel recognized the door was not sufficiently ajar to permit Ocean View to proceed. Ocean View did not purchase cathode, the

commodity that was the subject of the alleged market manipulation. Ocean View purchased copper rod, a product that is made from cathode and which contains an additional element in its pricing formula (the "rod premium") not present in the price of cathode. Copper rod is ***not*** traded on the LME, ***not*** traded on Comex and was ***not*** the target of Sumitomo's alleged misconduct. Indeed, the panel acknowledged that "the physical market transaction at the heart of the defendants' scheme [was] the purchase of cathode." App. 33a.

Undeterred, the panel opened the door even wider and permitted Ocean View to proceed on the theory that rod is basically the same as cathode, and that rod, like cathode, is priced by reference to Comex. App. 43a-44a.[3] Under the panel's logic, purchasers of copper anode—from which cathode is made and which is also priced by reference to Comex—should also be able to sue for any overcharges resulting from Sumitomo's misconduct. Yet the panel held that purchasers of anode would not have standing, in part because anode was not the form of copper that was the target of the manipulation.[4] But neither

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[3] The panel supported its finding that it is sufficient to purchase a product (rod) made from the allegedly manipulated product (cathode) by citing *In re Sugar Industry Antitrust Litig.*, 579 F.2d 13 (3d Cir. 1978). There, the Third Circuit held that where plaintiff purchased candy containing sugar and alleged that the price of sugar had been manipulated, *Illinois Brick* did not bar suit. The court, however, made clear that standing was limited to purchases of candy *from* the defendant, and specifically noted that "in the face of *Illinois Brick*, plaintiff has no hope of success on the purchases from nondefendants." *Id.*, at 16. Thus, *In re Sugar* actually supports Sumitomo's position—standing is limited to those who purchase the allegedly manipulated product (or another item made from that product) from a defendant, *not* a third party.

[4] Anode is between 98 and 99 percent pure copper. Cathode and rod are more than 99 percent pure copper. D.E. 316 (¶¶25-27).

was rod. Having abandoned the certainty of *Illinois Brick* and *Utilicorp*, the panel found itself playing fast and loose with its own exception, drawing artificial distinctions among "first purchasers" of various copper products in order to mold its exception to the facts of Ocean View's purchases. This entire exercise demonstrates the soundness of the no exceptions policy articulated in *Illinois Brick*, and reiterated in *Utilicorp*.

In the face of *Illinois Brick's* bar on suits by persons who did not purchase from the defendants, the panel allowed Ocean View to seek damages arising from hundreds of millions of dollars of purchases of copper from companies which are not defendants in this action. This ruling is flatly inconsistent with this Court's direction that only the "immediate buyers from the alleged antitrust violators" may sue for damages. *Utilicorp*, 497 U.S. at 207. And it opens the door to a complex analysis of Ocean View's Comex-referenced sales, in violation of *Hanover Shoe*. The petition should be granted to review this drastic departure from this Court's precedent on the subject of antitrust standing.

B. The Panel's Decision Conflicts With Decisions of the Third and Ninth Circuits Rejecting "Umbrella Standing"

In fashioning its exception to the direct purchaser rule, the panel reasoned that market manipulation cases are different, and that Sumitomo was not on the top of any distribution chain akin to that present *Illinois Brick*. The panel thus adopted the doctrine of "umbrella standing," under which persons who do not purchase from the defendants may sue to recover for overcharges generated under the "umbrella" of the manipulator's misconduct. The panel observed that "the Supreme Court has been willing to entertain suits between plaintiffs and defendants not in privity with each other." App. 17a. But the

cases it cited were *not* price-fixing cases. Rather, they involved refusals to deal and other exclusionary practices. *See, e.g., Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982) (exclusion and boycott of class of health care services from eligibility for reimbursement under insurance plan) and *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) (competitor's refusal to deal).

In price-fixing and price manipulation cases, however, courts—including the courts of appeal for the Third and Ninth Circuits—have followed *Illinois Brick's* mandate and barred claims by persons who did not buy from a defendant, regardless of whether the product originated with the defendant. These courts have flatly rejected the concept of "umbrella standing." *See, e.g., Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573, 587 (3d Cir. 1979); *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig.*, 691 F.2d 1335, 1340-41 (9th Cir. 1982).

The courts that have rejected umbrella standing have been concerned, in part, that a contrary ruling would result in an unreasonable expansion of liability. As the Third Circuit cautioned, "the judiciary should not be hasty to allow the treble damage action to become so destructive a force, when Congress intended only that it be used as a weapon to enforce the antitrust laws." *Mid-West Paper*, 596 F.2d at 586-587. Here, the panel adopted a rule of standing that would hold Sumitomo liable to *anyone* who purchased cathode or rod from *any* seller of cathode or rod between 1990 and 1996. This would be in addition to Sumitomo's potential liability to all LME and Comex futures traders during the same period, as well as potential liability under *Illinois Brick* to physical market participants who purchased directly from Sumitomo. To state this result is to demonstrate the error of the panel's decision.

The panel's abandonment of *Illinois Brick* and its adoption of umbrella standing appear to have been prompted by its belief that the defendants' position was that because the alleged manipulation took place on a futures market, no one in the physical market could sue. App. 20a-21a. As a matter of law, the panel's reasoning was seriously flawed. *Illinois Brick* does not give the lower courts license to grant standing whenever they perceive the need to punish a defendant. The *only* relevant inquiry is whether the plaintiff is a direct purchaser. In any event, the panel's premise was simply erroneous. Ocean View alleged that Sumitomo intended to profit from its alleged manipulation by selling cathode in the physical market. Thus, as Sumitomo argued below, and the district court correctly found, there are participants in the physical market—those who purchased copper from Sumitomo—who were direct purchasers and would therefore be entitled to bring a claim under *Illinois Brick*. App. 87a.

In permitting Ocean View to sue a defendant from whom it did not purchase the product for which it seeks recovery, the panel effectively adopted the doctrine of umbrella standing. Its holding creates a conflict with rulings of the Third and Ninth Circuits, both of which have rejected such an exception to *Illinois Brick*. The petition should be granted to resolve this conflict.

C. The Panel Misinterpreted The *AGC* Standing Test

In *AGC*, this Court held that in determining whether an alleged antitrust injury is sufficiently direct to confer antitrust standing, a court should consider: (1) the causal connection the violation and the harm; (2) the presence of improper motive (*i.e.*, intent); (3) the type of injury and whether it was one Congress sought to redress; (4) the directness of the injury; (5) the speculative nature of the damages; and (6) the risk of duplicative recovery or

complex damages apportionment. *AGC*, 459 U.S. at 536-545. The panel misinterpreted this test in a manner that, if left unaddressed, opens the door to speculative claims and complex questions of apportionment of damages that *AGC* intended to foreclose.

First, and most fundamentally, the panel misinterpreted the sixth *AGC* factor, *i.e.*, the risk of duplicative recovery or complex damages apportionment. The record demonstrates that, to varying degrees and in varying ways, the suppliers who sold physical copper to Ocean View managed (or "hedged") the price risk associated with their physical operations by, among other things, purchasing Comex futures or options. The evidence submitted by Sumitomo was that such hedging created a risk of duplicative liability with respect to those suppliers' physical market sales. Based on this undisputed record, the district court found that, assuming Ocean View's allegation that Sumitomo was manipulating the futures markets was true:

> the market price at which a supplier hedged its future sales of copper would have been an artificial one that caused the supplier injury long before it shipped copper to plaintiff. To the extent that the supplier passed on the artificial price, plaintiff's damages would be duplicative of its supplier's, who could assert its own claim for overcharges on the same copper.

App. 86a.

The panel erroneously reached the opposite conclusion here by reasoning that because purchases of physical copper could not be "matched" with specific futures trading on the exchanges, it would be impossible to determine the precise extent of the duplication. App. 35a-37a and 43a. It then directed that on remand, the district court "explore further whether these hedging

transactions would lead to some degree of duplicate recovery and a corresponding need to reduce damages." App. 36a. In effect, the panel held that the complex relationship between futures trading and physical market sales precluded Sumitomo from establishing that any recovery by Ocean View would duplicate the damages to a particular futures trader.

By requiring defendants to prove that Ocean View's claimed damages would duplicate the recovery of a specific futures trader, the panel turned the *AGC* standing inquiry on its head. Standing is plaintiff's burden, not defendants'. *See* Philip E. Areeda & Herbert Hovenkamp, II *Antitrust Law* 360 (Rev. Ed. 1995). The inordinate complexity of the damages calculation is a reason to deny standing, not to grant it. *Illinois Brick*, 431 U.S. at 730-731. Thus, the only conclusion to draw from the record was not that Sumitomo failed to prove a duplication of damages; rather, the panel should have concluded that Ocean View could not prove that its recovery will *not* duplicate damages allegedly suffered in the futures market in connection with the hedging activities of Ocean View's suppliers. The panel's invitation to the district court and Sumitomo to engage in a trade-by-trade analysis of Ocean View's purchases and the hedging activities and daily futures positions of Ocean View's suppliers over a six year period is precisely the type of complex exercise that the *AGC* test seeks to avoid.

Second, the panel erroneously concluded that Ocean View's injury was sufficiently direct. It based this finding on its belief, formed in connection with a related appeal, that "Sumitomo purchased futures on Comex to drive up the price on that particular exchange artificially, and the prices Viacom paid for copper were directly based on Comex prices." App. 27a. There was no evi-

dence that Sumitomo's allegedly manipulative activities took place on Comex, and the panel cited none. Indeed, Ocean View never made any such allegation—its complaint referred to manipulation on the LME, and alleged that the LME and Comex move in lockstep. D.E. 318 (Ex. 1). But the undisputed evidence in the record was that LME and Comex prices often diverge significantly. D.E. 321 (¶71) and D.E. 316 (at DPFF ¶137). Thus, the requisite direct linkage between Sumitomo's alleged manipulation of the LME and Ocean View's physical market purchases at prices linked to various Comex-referenced formulas was lacking.

Moreover, the panel erroneously applied its review of the record in the *Viacom* appeal to the facts in *Ocean View*. Thus, the panel found that because Viacom's purchases were all based on one Comex reference price (the month average) plus a cathode premium, the Comex futures prices and the price Viacom paid for cathode moved in lockstep. App. 28a-29a. It therefore rejected evidence that Comex quotes numerous exchange prices at any given time and that Sumitomo's actions could have affected those prices differently as irrelevant to Viacom's purchase patterns. Yet the court recognized that if a purchaser used multiple Comex-referenced pricing formulas, "perhaps they should be found to be improper plaintiffs under the antitrust laws, though it is an issue for another day." App. 29a-30a. The undisputed evidence was that Ocean View used four formulas, and that the use of those formulas varied over time. D.E. 316 (DPFF ¶49). Thus, Ocean View presented the "issue for another day," which the panel simply ignored.

Finally, the panel incorrectly concluded that Ocean View's injury was not speculative. In reaching this conclusion, it again ignored the evidence concerning Ocean View's business. That evidence demonstrated that Comex

—the index used for Ocean View's purchases—was the "overriding factor that affected the market price of [Ocean View's] end products on a day-to-day basis." App. 73a. It also demonstrated that Ocean View passed on to its customers all or part of any increases in the cost of the copper it purchased. D.E. 316 (DPFF ¶¶ 145-146). For example, Ocean View admits that virtually all of the $12 million increase in gross profits in 1994 was attributable to higher copper costs—*i.e.*, higher Comex prices. *Id.*

Presented with similar evidence of purchases and sales made with reference to Comex in connection with the appeal of another of the related cases decided by the district court,[5] the panel found that because the plaintiffs in those cases (the "Scrap Dealers") bought and sold physical copper at Comex related prices:

> it is difficult to know whether they suffered any economic loss at all as a result of the defendants' actions . . . [T]he Scrap dealers . . . are alleging that the defendants' market manipulations caused the price of copper to increase steadily from 1994 to 1996. Therefore, on most or all of the sales the Scrap Dealers made in that time frame, which they contend are inflexibly linked to prevailing Comex prices, they should have made a slight profit because of Sumitomo's actions. . . . In short, the exact nature of the damages they have suffered is speculative.

App. 24a. *See also* App. 26a ("Yet the evidence shows that Sumitomo's actions caused the Comex price to rise throughout the period at issue in this case, making us

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[5] *Loeb Industries, Inc. v. Sumitomo Corporation* (No. 00-3979) and *Loeb Industries, Inc. v. JPMorgan Chase* (No. 01-1148). The panel consolidated the *Loeb*, *Viacom* and *Ocean View* appeals for purposes of issuing its opinion.

skeptical that the Scrap Dealers have suffered any real loss at all.")

The panel's reasoning with respect to the Scrap Dealers in *Loeb* applies with equal force to Ocean View. Ocean View purchased at prices referenced to Comex. It sold at prices referenced to Comex. When prices went up, its gross profits went up. The panel should therefore have been equally "skeptical" that Ocean View suffered any real loss at all, and should also have concluded that the "exact nature" of the damages Ocean View suffered is "speculative."

In creating the rules of standing reflected in *Illinois Brick* and *AGC*, this Court recognized that there might be cases in which parties injured as a result of an antitrust conspiracy would be unable to recover damages. *See, e.g., Illinois Brick,* 431 U.S. at 746. But it concluded that there were very important policy considerations, including the need to avoid converting antitrust actions into complex exercises in apportioning damages among purchasers at various levels in a market, which necessitated this result. The panel's rewriting of *Illinois Brick* and *AGC* threatens to open the door to the types of claims that *Illinois Brick* and *AGC* intended to foreclose. The petition should be granted to correct these mistakes.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Dated: New York, New York
March 21, 2003

Respectfully submitted,

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Sumitomo Corporation Futures, Inc.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 00-3979, 01-1148

LOEB INDUSTRIES, INCORPORATED, LOS ANGELES SCRAP IRON & METAL CORPORATION, and METAL PREP COMPANY, INCORPORATED,

Plaintiffs-Appellants,

—v.—

SUMITOMO CORPORATION and GLOBAL MINERALS AND METALS CORPORATION,

Defendants-Appellees.

LOEB INDUSTRIES, INCORPORATED, LOS ANGELES SCRAP IRON & METAL CORPORATION, and METAL PREP COMPANY, INCORPORATED,

Plaintiffs-Appellants,

—v.—

JPMORGAN CHASE & CO.,*

Defendants-Appellees.

ARGUED SEPTEMBER 5, 2001

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* For purposes of this opinion we are using the current name of the bank, which is JPMorgan Chase & Co. That entity includes both J.P. Morgan & Co., Inc., and Morgan Guaranty Trust Co. of New York.

Nos. 01-3229, 01-3230

OCEAN VIEW CAPITAL, INCORPORATED, formerly known as TRIANGLE WIRE & CABLE, INCORPORATED,

Plaintiff-Appellant,

—v.—

SUMITOMO CORPORATION OF AMERICA, SUMITOMO CORPORATION, GLOBAL MINERALS AND METALS CORPORATION, *et al.*,

Defendants-Appellees.

SUBMITTED SEPTEMBER 13, 2001**

No. 01-3485

VIACOM, INCORPORATED, as successor by merger to CBS CORPORATION, formerly known as WESTINGHOUSE ELECTRIC CORPORATION, and EMERSON ELECTRIC COMPANY,

Plaintiffs-Appellants,

—v.—

GLOBAL MINERALS AND METALS CORPORATION and CREDIT LYONNAIS ROUSE, LTD.,

Defendants-Appellees.

ARGUED MAY 16, 2002

** After an examination of the briefs and the record in Nos. 01-3229 and 01-3230, we have concluded that oral argument is unnecessary. Thus, those appeals are submitted on the briefs and the record. See FED. R. APP. P. 34(a)(2).

Appeals from the United States District Court
for the Western District of Wisconsin.
Nos. 99 C 377, 99 C 468, 99 C 621, 99 C 801,
00 C 274, 00 C 528—**Barbara B. Crabb**, *Chief Judge.*

DECIDED SEPTEMBER 20, 2002

Before CUDAHY, ROVNER, and DIANE P. WOOD, *Circuit Judges.*

DIANE P. WOOD, *Circuit Judge.* These cases, which we have consolidated for purposes of this opinion, all arise out of an alleged conspiracy in the 1990s to fix the price of copper futures at artificially high levels on the international exchange markets. This market manipulation necessarily and directly inflated the price of the products purchased by the plaintiffs, buyers of copper cathode, copper rod, and scrap copper, who have sued for violations of the Sherman Act, RICO, and various state laws. The district court dismissed the claims of each of the plaintiffs either on the ground that their claims were barred by the indirect purchaser rule of *Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977), or on the ground that their injuries were too remote and speculative under *Associated General Contractors of Cal. Inc. v. California State Council of Carpenters,* 459 U.S. 519 (1983) *(AGC).* We find that *Illinois Brick* presents no obstacle to any of the plaintiffs' claims but that the claims of the scrap copper dealers are precluded under *AGC.* On the other hand, we conclude that the purchasers of copper cathode and rod have suffered a direct and independent injury and are the best situated participants

in the physical copper market to bring a lawsuit. We therefore affirm in part, reverse in part, and remand in part for further proceedings.

I

A. The Parties

The production of copper entails a complicated four-step process. First, copper producers extract ore from a copper mine and crush or mill it into a gravel-like substance known as concentrate. Second, smelters separate out the nonferrous metals in the concentrate, producing one-meter square plates of anode, which are approximately 90% copper. Next, the anode is refined electrolytically to create sheets of cathode. Finally, the cathode is fed into a furnace at a mill and melted into rod or wire. In the course of manufacturing cathode and rod, scrap copper is also produced, and it too can be sold into the market.

The plaintiffs in these actions are large companies occupying various positions along the copper production chain. The plaintiffs in No. 01-3485, Viacom, Incorporated (a successor to Westinghouse Electric Corporation) and Emerson Electric Company, turn copper cathode into wire for resale to merchants. Each purchased hundreds of millions of pounds of cathode during the relevant time period from integrated producers, who smelt and refine copper from their own mines into cathode.

Ocean View Capital is the plaintiff in Nos. 01-3229 and 01-3230. Until it went out of business in 1996, it was a large Rhode Island-based manufacturer of copper wire and cable. Unlike Viacom and Emerson, Ocean View normally did not purchase cathode; instead, it bought copper that had already been transformed into rod. Some of this rod was manufactured by integrated

producers. Ocean View also contracted frequently with semi-fabricators, which own and operate rod mills but do not own mines, concentrators, smelters, or refineries. Instead, semi-fabricators typically purchase cathode from producers or copper traders and fabricate the cathode into rod. On some occasions, Ocean View varied this process by entering into tolling agreements with its semi-fabricators under which it purchased its own cathode from producers or traders and then paid the semi-fabricator to convert it into usable rod.

The plaintiffs in *Loeb Industries v. Sumitomo*, Nos. 00-3979 and 01-1148, are three scrap metal dealers (to whom we refer as the "Scrap Dealers"). Each purchases only scrap copper; none buys either cathode or rod. The scrap is purchased from a variety of sources, including integrated producers and wire manufacturers, and then repackaged and resold.

B. The Copper Market

Despite the fact that copper is sold in a variety of physical forms, the summary judgment record (viewed in the light most favorable to the plaintiffs) indicates that the pricing of copper is consistent throughout the industry. Like many other commodities, copper is traded on commodities exchanges through warrants and futures contracts. Most copper futures are traded on either the London Metals Exchange (LME) or the Commodities Exchange Division of the New York Mercantile Exchange (known familiarly as the "Comex"). When futures contracts mature, they must either be closed out by an offsetting trade or satisfied by deliveries of the underlying physical goods. If a futures trader is short, she must satisfy her obligation under the futures contract by immediately delivering physical copper cathode to an LME or Comex warehouse; if a trader is long, she may similarly

call in physical copper cathode from a warehouse. Because of this, the price of physical copper, including cathode, rod, and scrap copper, is directly linked to the LME and Comex price for copper futures, and dealers in all forms of physical copper quote prices based on rigid formulas related to copper cathode futures.

While sales between six plaintiffs and numerous other copper industry participants are involved, we will illustrate this linkage by discussing only the relationship between one of the plaintiffs, Viacom, and the largest integrated producer, Asarco. Viacom entered into yearly supply contracts with Asarco, copies of which are included in the record. In these contracts, the price Viacom paid Asarco for cathode was made up of two components. First, the base price was set by "the arithmetic average of the COMEX first position settlements for high-grade copper during the calendar month of scheduled shipment." From 1990 to 1996, this price fluctuated from about 75¢/lb to over $1.40/lb. Added to the base price was a "cathode premium" that was set on a monthly or quarterly basis. Asarco's premium fluctuated over the relevant time period from 2.75¢/lb to 3.5¢/lb. The record also indicates that when the base price of copper increased, the premium tended to increase as well.

Viacom bought over half a billion pounds of cathode from Asarco. Asarco manufactured most of this cathode, but some had been purchased for resale from other merchants to make up for production shortfalls. Because records of these purchases were not kept, it is impossible to tell whether any particular pound of cathode sold to Viacom was manufactured by Asarco or merely purchased for resale. The defendants concede, however, that some of the cathode in question was being sold into the market for the first time. While there is some dispute as

to the exact numbers, taking the evidence in the light most favorable to Viacom, Asarco sold it 510 million pounds of cathode over the relevant period. During this same time frame, Asarco refined 6.4 billion pounds of cathode and purchased 153 million pounds from third parties. Therefore, even if one assumed that every scrap of Asarco's previously sold cathode was shipped to Viacom (instead of to one of its many other customers), Viacom still purchased 357 million pounds of never-before-purchased cathode. Viacom seeks damages in this suit only for cathode that was sold to it for the first time by its integrated producers.

Asarco also purchased raw materials, such as concentrate and anode, to supplement its own production and keep its smelters and refineries running at full capacity. At least 27 million pounds of the cathode Asarco shipped to Viacom consisted entirely of Asarco raw materials, but the rest may well contain some percentage of previously purchased materials. While raw materials are often priced in reference to Comex prices, only cathode is actually traded on the exchange. Raw material prices also incorporate significant and widely varying discounts based on both the cost of converting the materials into cathode and current refining and smelting capacity. Furthermore, the defendants' experts testified that while the prices of raw materials "may be indirectly affected by the manipulations," a squeeze or corner on cathode could not directly harm the purchasers of pre-cathode raw materials.

The pricing of rod and scrap are similar except that each contains further premiums and discounts off the cathode futures price to reflect a variety of additional costs. Rod pricing contains an additional rod or shaping premium. Scrap copper prices are affected by not only

the price of cathode but also freight costs, sizing, sorting, packaging, and purity requirements.

Some of Viacom's suppliers and customers engaged in strategic hedging by purchasing "put" options on the futures markets. A put option holder has the right, but not the obligation, to sell a futures contract at an established "strike" price. If the market price is higher than the strike price (because, for example, the price has been artificially raised), the holder's option will expire and its only cost will be the price of the option. Asarco purchased put options to hedge its output, but it did not hedge against specific transactions, by, for example, purchasing a futures contract for each sale made to Viacom. Its hedging activities were also limited to a fraction of its supply. One of Viacom's suppliers, Kennecott, did not hedge at all, and Viacom itself never hedged its copper purchases.

C. The Conspiracy

Defendant Sumitomo Corporation is a Japanese trading corporation that attempted to fix and maintain the price of copper at artificially high levels from September 1993 to June 1996, all with an eye to enriching itself in its capacity as a seller of physical copper. Through a series of transactions with defendant Global Minerals and Metals Corporation, a copper merchant, it hoarded vast supplies of physical copper for the purpose of restricting supply, and it entered into paper transactions in order to show a false increased demand for the metal. In particular, Sumitomo established sham long-term contracts that purportedly required it to purchase vast quantities of copper from Global on a monthly basis over a period of three years. These sham contracts enabled Sumitomo publicly to justify its accumulation of excessive copper forward positions as a hedge. By June 1995,

Sumitomo held approximately ten percent of the entire long position in Comex copper futures.

At that time, Sumitomo began to call in shorts to raise copper demand to inflated levels and to reap the profits from its sales. When these contracts came due, short futures traders were forced to cover their positions by acquiring physical copper at inflated prices, because no new copper was entering the warehouses thanks to Sumitomo's actions. These manipulations caused the price of primary copper to rise more than 50% over a two-year period. In June 1996, the scheme was uncovered, and the trading price for copper dropped by a third almost overnight. The prices of physical copper cathode, rod, and scrap crashed comparably.

In 1998, the United States Commodities and Futures Trading Commission (CFTC) determined that Sumitomo had violated the Commodity Exchange Act by raising and fixing the price of copper futures and reached a settlement with the company that required it to pay a $150 million fine. That finding has spawned a number of antitrust suits against the defendants, including class action lawsuits on behalf of those who traded copper futures and on behalf of certain purchasers of primary copper. Sumitomo settled its suit with the futures traders for approximately $134 million. The defendants have also settled a California state court class action brought under various state antitrust laws. Many of the plaintiffs' sellers, including Asarco, participated in the lawsuit and received 0.15 cents per dollar of copper purchased.

II. Proceedings in the District Court

These lawsuits were all consolidated in the Western District of Wisconsin by the Judicial Panel on Multidistrict Litigation. The defendants include not only Sum-

itomo and Global, but also alleged co-conspirators Credit Lyonnais Rouse, Ltd. (CLR), and J.P. Morgan and Morgan Guaranty Trust (which have since merged to form JPMorgan Chase & Co. and to whom we refer collectively as JPMorgan Chase). The plaintiffs in each case sought damages for the allegedly inflated overcharge in the price of the copper products they had purchased, which was caused by Sumitomo's actions. The Scrap Dealers also sought certification of a class under FED. R. CIV. P. 23 consisting of all metals dealers who purchased any form of physical copper in commercial quantities between 1994 and 1996. The defendants moved to dismiss each of the actions.

The district court first denied the motion to dismiss Ocean View's complaint on May 9, 2000. *In re Copper Antitrust Litig.*, 98 F. Supp. 2d 1039 (W.D. Wis. 2000). The district court found that if the facts alleged in the complaint were true, Ocean View was a proper party to sue under the principles espoused by this court in *Sanner v. Board of Trade,* 62 F.3d 918 (7th Cir. 1995). The court also denied a motion to dismiss Viacom's complaint on similar grounds. It allowed both cases to proceed, but limited discovery to the issue of standing.

The court next examined the claim of the Scrap Dealers. It denied their motion for class certification, fundamentally because it concluded that the proposed named plaintiffs could not sue, either for their own injuries or for those of others similarly situated, because they fell within the ban on indirect purchaser suits established by *Illinois Brick,* 431 U.S. at 720. The court decided in addition that the proposed class would be unmanageable, because it would be impossible to ascertain class membership. It then turned to the defendants' 12(b)(6) motion to dismiss. The court found that the Scrap Dealers' bare-bones allegations were sufficient to state a claim,

but that in light of deposition testimony and other facts adduced during litigation of the *class certification* question, it would nonetheless grant the motion based once again on the perceived *Illinois Brick* flaw. The court did not, in so ruling, follow the command of Rule 12(b)(6) to convert the motion to dismiss into a motion for summary judgment under Rule 56, despite its reliance on matters outside the complaint. The court also dismissed the Scrap Dealers' RICO allegations on the same grounds.

Soon thereafter the district court granted JPMorgan Chase's motion to dismiss all claims that the Scrap Dealers had brought against it on the ground that the plaintiffs were subject to offensive issue preclusion on the pivotal question of their status as indirect purchasers.

After discovery closed in the remaining cases, the defendants filed for summary judgment. On July 23, 2001, the district court granted summary judgment to all of the defendants on Ocean View's claims, finding that Ocean View had no right to sue under the antitrust laws both because it was an indirect purchaser *(Illinois Brick)* and because its injuries were too remote (AGC).

A month later, the district court granted summary judgment to Global and CLR on Viacom's claim. In contrast to its conclusions in *Loeb* and *Ocean View,* the court here rejected the argument that the claim was barred by *Illinois Brick.* Instead, it applied the factors set forth in AGC and determined that a manipulation of the futures market would have effects too "subtle and complex" to warrant recovery for these cathode purchasers. The district court primarily relied on the following factors: (1) the huge number of exchange-based pricing formulas available on Comex; (2) the various premiums and discounts available in the industry; (3) potential duplication of recovery due to purchases of cathode and raw mate-

rials by the integrated producers who sold to Viacom; (4) potential duplication of recovery due to hedging; and (5) the complexity of the damages calculation. For similar reasons, the district court also granted summary judgment to the defendants on Viacom's RICO claims. With the federal claims gone, it finally dismissed Viacom's state law claims without prejudice.

III. Use of Rule 12(b)(6)

Before turning to the important antitrust issues underlying all of these appeals, we must deal with an issue of federal civil procedure unique to the appeal of the Scrap Dealers. They argue that the district court committed reversible error by relying on outside materials in evaluating the motion to dismiss without giving them notice and an opportunity to submit additional materials. As they correctly point out, Rule 12(b) requires that if the district court wishes to consider material outside the pleadings in ruling on a motion to dismiss, it must treat the motion as one for summary judgment and provide each party notice and an opportunity to submit affidavits or other additional forms of proof. *Fleischfresser v. Directors of School Dist. 200,* 15 F.3d 680, 684 (7th Cir. 1994). This requirement of a reasonable opportunity to respond is mandatory, not discretionary. *Edward Gray Corp. v. National Union Fire Ins. Co.,* 94 F.3d 363-366 (7th Cir. 1996).

In this case, the district court stated that, considering only the bare pleadings, it would find that the Scrap Dealers had stated a claim. Notwithstanding this conclusion, relying on the materials and affidavits produced for the earlier class certification hearing, it instead granted the defendants' motion dismissing the case. We agree with the Scrap Dealers that this was error, and that

the district court should have given them notice of its intentions and an opportunity to respond and produce additional facts going beyond whatever might have been appropriate for class certification purposes.

The question, however, is what the consequence of this error should be. The Scrap Dealers assume that reversal should be automatic, but this position overlooks the command of 28 U.S.C. § 2111, which directs appellate courts to apply the harmless error rule to anything that does not affect the "substantial rights of the parties." We are not aware of any case that holds that the command of Rule 12(b)(6) to convert a motion to dismiss into a summary judgment motion is somehow exempt from § 2111. The question for us is therefore whether the district court's error affected the Scrap Dealers' substantial rights.

To answer that question, we must consider whether the Scrap Dealers have shown us any evidence raising a question of material fact that they would have submitted to the district court had they been given proper notice of the *de facto* conversion. *Burick v. Edward Rose & Sons*, 18 F.3d 514, 516 (7th Cir. 1994). If there are no potential disputed material issues of fact, then the court's reliance on materials outside the pleadings is not by itself ground for reversal despite the failure to follow appropriate procedures. *Ribando v. United Airlines, Inc.*, 200 F.3d 507, 510 (7th Cir. 1999). Here, the dispute over whether the Scrap Dealers were proper plaintiffs to sue under the antitrust laws was a hard-fought issue in the class certification hearings, and the Scrap Dealers devoted substantial portions of both their reply brief and supplemental brief to the issue. Furthermore, the district court provided an after-the-fact opportunity to the Scrap Dealers to bring additional materials to its attention in the subsequent litigation against JPMorgan Chase. See

Edward Gray Corp., 94 F.3d at 366 (reversing where plaintiff had no opportunity to submit materials that did create a factual dispute). In light of these facts, we are confident that the Scrap Dealers had a full opportunity to bring all material factual disputes to the court's attention. Therefore, we will review dismissal of all of these actions, as we would any other ruling on summary judgment, drawing all disputed or potentially disputed factual inferences in favor of the plaintiffs and deciding *de novo* whether the defendants were entitled to judgment on the law. *Simmons v. Chicago Bd. of Educ.*, 289 F.3d 488, 491 (7th Cir. 2002).

The Scrap Dealers also contend as a threshold matter that the district court's reliance on materials submitted for the class certification hearing to rule against them on summary judgment violates the dictates of *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). This over-reads *Eisen*, in our opinion. *Eisen* merely indicates that a court may not refuse to certify a class on the ground that it thinks the class will eventually lose on the merits. Id. at 177-78; see also *Szabo v. Bridgeport Mach., Inc.*, 249 F.3d 672, 677 (7th Cir. 2001). It says nothing about whether courts may use evidence produced at a prior class certification hearing for other purposes, including for a decision on summary judgment. We see no reason why these affidavits should be treated any differently from other parts of the record which may be considered in later rulings. See *Kochlacs v. Local Bd. No. 92*, 476 F.2d 557, 558 n.1 (7th Cir. 1973). We may therefore rely on the materials and affidavits submitted at the class certification hearing in determining whether the district court's decision to grant the defendants' motion in the Scrap Dealers' action was correct.

IV. *Illinois Brick*

While the Clayton Act permits civil suits by "any person who shall be injured in his business or property," 15 U.S.C. § 4, courts have long acknowledged that not every person, however tangentially injured by an antitrust violator, may recover treble damages. *Blue Shield of Va. v. McCready*, 457 U.S. 465, 477 (1982). Numerous doctrines have arisen to clarify the circumstances under which a particular person may recover from an antitrust violator. At times these doctrines are rather incautiously lumped together under the umbrella term of "antitrust standing." However, the Supreme Court has generally been careful to limit the actual question of standing to the simple inquiry of whether a plaintiff has suffered a redressable injury in fact, entitling the federal courts to hear such a "case or controversy" under Article III. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). There is no dispute that the plaintiffs in these cases have been injured by paying an inflated price for copper; their Article III standing is therefore secure. The difficult question is statutory, because the Sherman Act has additional rules for determining "whether the plaintiff is the proper party to bring a private antitrust action." *AGC*, 459 U.S. at 535 n.31. For example, the injury must be an "antitrust injury" caused by anti- competitive behavior as opposed to mere economic loss. *Brunswick v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487-89 (1977). Two other limitations on which parties may bring suit for antitrust violations are central here: the proximate cause requirements of *AGC*, 459 U.S. at 544-45, and the direct purchaser rule of *Illinois Brick*, 431 U.S. at 729-30.

Illinois Brick holds that the direct purchaser from the alleged antitrust violator(s) is the one with the right of

action; those further removed from the illegal arrangement may not (under the federal antitrust laws, at least) bring their own actions. 431 U.S. at 729. In *Illinois Brick* itself, the defendants were companies who sold bricks to masonry contractors at allegedly inflated prices. The contractors in turn allegedly "passed on" those overcharges to the plaintiffs who purchased their constructed buildings. *Id.* at 726. In an earlier decision, *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968), the Supreme Court had decided that defendants could not escape liability on the ground that the plaintiff had passed on the anticompetitive overcharge. By parity of reasoning, the Court decided in *Illinois Brick* that the persons authorized to sue under the antitrust laws in this type of case were the direct purchasers. Hence, the contractors were permitted to sue and recover in full for the price inflation, including any "pass-on."

Illinois Brick does not stand for the proposition, as the defendants would seem to have it, that a defendant cannot be sued under the antitrust laws by any plaintiff to whom it does not sell (or from whom it does not purchase). Such a rule would eliminate in one fell swoop all competitor suits based on exclusionary practices—a step that some antitrust theorists have urged, but a step that the Supreme Court has never taken. To the contrary, the Court has made it clear that it does not read *Illinois Brick so* broadly. For instance, the plaintiff in *McCready*, who purchased the defendant's health services from her employer, alleged that a conspiracy between the defendant and psychiatrists increased her costs for visiting a psychologist. 457 U.S. at 468-70. The defendant contended that after *Illinois Brick* only the employer who purchased the health plan should be permitted to sue, but the Court disagreed. It held that the chain-of- distribution inquiry in *Illinois Brick* was meant only to preclude

duplicate recovery. While the employer might have suffered some economic injury (through, for example, paying higher wages to attract skilled workers in order to compensate for the illegally inferior benefits), its harm was distinct from the plaintiff's injury, her own out-of-pocket payments for psychological services. *Id.* at 475.

While it is not identical to this case, *McCready is* helpful insofar as it recognizes that different injuries in distinct markets may be inflicted by a single antitrust conspiracy, and thus that differently situated plaintiffs might be able to raise claims. The injuries suffered by the copper traders who purchased inflated futures contracts from the defendants are distinct from any harm inflicted on Viacom when it paid inflated cash prices for cathode, or on Ocean View, to the extent it purchased copper rod from integrated producers. Other cases also demonstrate that the Supreme Court has been willing to entertain suits between plaintiffs and defendants not in privity with each other. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988) (plastic conduit manufacturer suing competitor steel conduit manufacturer); *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85 (1984) (university suing association that prohibited it from entering a television contract); *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) (store suing competitor over refusal to deal).

The reason the plaintiffs' suit in *Illinois Brick* failed was not because the defendants did *not* sell to them. Rather, it was because the defendants *did* sell to a third party who (after *Hanover Shoe)* could recover for any injury they claimed. The same paradigm applies in all of the cases cited by the defendants: Party A, the antitrust violator, sells to Party B, and then Party C, a down-stream

purchaser from B, seeks to recover the implicit overcharges that B passed on to C. See, *e.g.*, *Kansas v. Utili Corp United, Inc.*, 497 U.S. 199, 207 (1990) (public utilities but not residential customers to whom they sell may sue natural gas companies); *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 606 (7th Cir. 1997) (drug wholesalers but not retail pharmacies to whom they sell may recover from manufacturers); *McCarthy v. Recordex Serv., Inc.*, 80 F.3d 842, 852-54 (3d Cir. 1996) (attorneys may recover overcharges for copies, but the clients to whom they offer services may not); *In re Beef Indus. Antitrust Litig.*, 710 F.2d 216, 218 (5th Cir. 1983) (packers who sell to grocers may recover for their unlawful conduct but feeders who sell to packers may not).

Here, in contrast, the plaintiffs are not indirect purchasers along a supply chain. As far as the plaintiffs' claims are concerned, Global, CLR, and Sumitomo did not sell cathode to integrated producers who in turn sold to any of the plaintiffs. Instead, the alleged conspiracy operated in the separate but related futures market, through which it sought directly to manipulate the price of copper the plaintiffs were buying. (It is true that Sumitomo Corporation made some sales of cathode, primarily overseas, to reap the benefit of its illegal futures market scheme. None of the plaintiffs, however, is seeking recovery on the basis of any of these cash market sales; all rest solely on the manipulation of sales of futures contracts. *Sanner v. Board of Trade*, 62 F.3d 918, 929 (7th Cir. 1995), discussed below, recognizes such a theory, and we see no reason why the mere existence of separate independent physical transactions should in any way change the analysis.)

The defendants repeatedly urge that the availability of recovery for copper futures traders who bought and sold

from the defendants in that market should bar recovery for any plaintiff in the cash market. But this kind of an absolutist approach is ruled out by *Sanner,* which recognized at least one situation in which the futures market and physical market must be evaluated separately. The serious question here is whether these plaintiffs have presented another such instance.

In *Sanner,* a group of soybean farmers sued the Chicago Board of Trade alleging that the Board conspired with several individuals artificially to lower the price of soybean futures. The farmers suffered damages when they were forced to sell their soybeans into the cash market at correspondingly low prices. *Id.* at 921. The district court granted a motion to dismiss, finding as a matter of law that the farmers' injuries were indirect because the farmers did not participate in the futures market, that the causal chain between the cash and futures prices was too attenuated, and that damages were too speculative. *Id.* at 926.

This court reversed the dismissal. On the assumption (given the procedural posture of the case) that the farmers' allegations about the relation between the cash and futures markets were true, and that those market prices "tend[ed] to move in lockstep," we determined that the farmers had suffered sufficiently direct injuries from the conspiracy to proceed with their case. *Id.* at 929-30. We rejected the proposition that "participants in the futures market were more directly injured," so as to preclude recovery by farmers in the cash market and denied the defendants' claim that we should assume at the motion to dismiss stage that damages would be too speculative. *Id.* at 931. From the perspective of *Illinois Brick,* the *Sanner* court expressly found that in the context of a market manipulation scheme, damages inflicted on the physical commodity market were not derivative of

injuries in the futures market. Unlike *Illinois Brick,* the harms incurred in the physical market during a market manipulation are not "secondary consequences arising from an injury to a third party." *Id.* at 929. Instead, they form a separate and compensable injury.

The defendants' reading of *Illinois Brick is* inconsistent with *Sanner.* Their claims to the contrary, there is no indication in *Sanner* that the plaintiff soybean farmers were in privity with the Board of Trade, and as a factual matter the assertion is surely wrong. The Board and its members did not sell soybeans to the farmers; like the defendants here they dealt solely with futures contracts. If *Illinois Brick* bars all recovery here, it should have barred recovery in *Sanner* and should also bar recovery in group boycott and other restraint of trade settings.

To put it another way, *Hanover Shoe, Illinois Brick,* and *McCready* make plain that the antitrust laws create a system that, to the extent possible, permits recovery in rough proportion to the actual harm a defendant's unlawful conduct causes in the market without complex damage apportionment. This scheme at times favors plaintiffs *(Hanover Shoe)* and at times defendants *(Illinois Brick),* but it never operates entirely to preclude market recovery for an injury. Applying those principles and the decision in *Sanner* to this case, we conclude that the evidence viewed favorably to the plaintiffs shows that damage from the defendants' conduct was felt in two separate markets: the futures market and the physical copper market.*** We have identified those who may

*** The fact that the defendants were hoping to profit in the physical market, ultimately, through their manipulation of the separate futures market, also has implications for their arguments related to the so-called "umbrella standing" theory. The defendants object to the possibility that they might be held responsible for higher copper prices throughout the physical market, rather than just for the sales they made. If this were an ordinary cartel case, in which cartel mem-

recover in the futures market and must now turn to the more difficult question of establishing the proper plaintiff in the physical market. The defendants' answer (nobody) is not supported by *Illinois Brick*—or economics or fairness for that matter. Instead, we must be guided in our inquiry by the analytical framework and factors set out in *AGC*.

V. *Associated General Contractors*

AGC requires a court to examine through a case-by-case analysis the link between a plaintiff's harm and a defendant's wrongdoing. 459 U.S. at 535-36. We are to consider a number of factors in this analysis, notably (1) the causal connection between the violation and the harm; (2) the presence of improper motive; (3) the type of injury and whether it was one Congress sought to redress; (4) the directness of the injury; (5) the speculative nature of the damages; and (6) the risk of duplicate recovery or complex damage apportionment. *Id.* at 537-45; *Sanner,* 62 F.3d at 927. The defendants concede only the second factor: they admit that each of the plain-

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bers A and B sell to customers X and Y, and then non-cartel member firm C makes sales at or near the enhanced cartel price to customer Z, the question arises whether A and B are liable to Z for the overcharges it paid. See generally, ABA Section of Antitrust Law, 1 Antitrust Developments (Fourth) at 778-79 & n.128 (1997) (collecting cases on umbrella standing). Here, however, we have a conspiracy to rig prices for the entire physical market, accomplished through manipulation of the Comex futures market. Another possible analogy might be to rigging product standards, which affects everyone who tries to participate in a particular product market. In the latter case, the defendants who manipulated the standards cannot be heard to complain that they should be immune from damages for a product they did not sell. We leave this issue open for further exploration at the district court level, now that we have clarified how the direct purchaser rule and the remoteness doctrine of *AGC* apply here.

tiffs has adduced evidence sufficient to survive summary judgment that they intended artificially to inflate the price of both copper futures and physical copper in order to reap millions of dollars in profits. They contest each of the other points.

The first and third factors are discussed only cursorily by the defendants and can be dealt with adequately in the course of our analysis of the remaining three. For example, the defendants claim that there is no causal connection between their actions and any of the plaintiffs' harms because the plaintiffs' injuries are indirect (the fourth factor), and they argue that Congress had no intention of redressing this sort of injury because it is indirect and speculative (the fifth factor). We therefore devote our attention to the other three factors, considering in the case of each plaintiff whether its injury was indirect and unpredictable, risked duplicate recovery, and would lead to speculative and complex damage apportionment. We begin with the claims of the Scrap Dealers.

A. Scrap Dealers (*Loeb*, Nos. 00-3979, 01-1148)

The Scrap Dealers face problems with all three of the contested *AGC* factors. First, whether or not they were in some sense original purchasers of physical copper, that fact alone is not enough to establish that their injury flowed directly from the defendants' market manipulations. An injury is still indirect if a plaintiff fails to establish a chain of causation between the harm it has suffered and the defendant's wrongful acts. *AGC*, 459 U.S. at 541. The directness inquiry further focuses on the presence of more immediate victims of an antitrust violation in a better position to maintain a treble damages action. "The existence of an identifiable class of persons whose self-interest would normally motivate

them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party . . . to perform the office of a private attorney general." *Id.* at 542.

There are numerous other parties who have suffered more direct injuries at the hands of the defendants than the Scrap Dealers suing here. Among them (though as we explain below not limited to them) are the Comex copper futures traders who have already filed and settled their claims with the defendants. But even in the physical copper market itself, the Scrap Dealers are quintessential examples of indirect victims of antitrust injury. Although the copper distribution chain is exceedingly complex, even in the simplest possible version, an integrated producer such as Asarco will refine copper into cathode and sell it to a manufacturer, such as Viacom, Emerson, or Ocean View. The manufacturer will in turn transform the cathode into some product using copper and sell it down to the retail level. In the process, it may generate unused scrap copper, at which point the Scrap Dealers finally appear on the scene to buy the scrap. It is for these last purchases that the plaintiffs seek to recover damages. But distributors and manufacturers have already entered into monetary transactions involving this same copper, and indeed we are faced in this very case with suits filed by some of those manufacturers. It is apparent that these companies at the least have suffered more direct injuries than the Scrap Dealer plaintiffs. This stands in marked contrast to *Sanner,* where the soybean farmers were clearly the most directly injured participants in the cash market because they were the only cash sellers of soybeans. *Sanner,* 62 F.3d a 927.

The speculative nature of the damages the Scrap Dealers have suffered also supports our conclusion that they cannot maintain this action. *See id.* at 542-43 (denying

a claim that rested on an "abstract conception or speculative measure of harm"). The Scrap Dealers' economic experts have stated that they can tie a rise in the price of copper futures directly to price increases for physical copper through econometric analysis. Defendants argue to the contrary that a host of other factors are also at play, destroying the closeness of any link. Even accepting the Scrap Dealers' position on this point, as we must at this stage of the litigation, it is difficult to know whether they have suffered any economic loss at all as a result of the defendants' actions. After all, the Scrap Dealers, middlemen who resell their scrap copper soon after they purchase it, are alleging that the defendants' market manipulations caused the price of copper to increase steadily from 1994 to 1996. Therefore, on most or all the sales the Scrap Dealers made in that time frame, which they contend are inflexibly linked to prevailing Comex prices, they should have made a slight profit because of Sumitomo's actions. Only when the price of copper plummeted in June 1996 would the Scrap Dealers have taken a bath in the resale market. And depending on how much copper the Scrap Dealers had on hand as compared to the number of transactions they made as the price of copper was increasing, it is possible that some of them may have suffered no true economic loss at all. In short, the exact nature of the damages they have suffered is speculative.

The Scrap Dealers attempt to counter this problem by arguing that damages can be set simply by computing the difference between the price of copper that should have prevailed on a given day absent Sumitomo's manipulations and the actual price for every copper transaction. This assertion, however, plunges the Scrap Dealers headlong into conflict with the sixth *AGC* factor, the problems of duplicate damage recovery and complex

damage apportionment. The Scrap Dealers argue that they—and all other commercial purchasers of physical copper—should be permitted to recover damages equal to three times the overcharge caused by Sumitomo's scheme for every single sale of copper in the mid-1990s. But this proposition ignores the fact that the same piece of physical copper may be resold many times in a given year as it is refined, distributed, turned into scrap, sold between scrap dealers, re-refined, and sold for scrap again. As mentioned above, every time a scrap dealer resold scrap copper during the two years at issue, it recouped the vast majority of its losses. Since defendants are not permitted to mount any sort of cost recovery defense along these lines, see *Hanover Shoe,* 392 U.S. at 491-94, this would cause the Scrap Dealers to receive a damages award far in excess of any economic loss the defendants caused them. While *Sanner* permitted farmers to recover their soybean losses, it did not let millers, wholesalers, or retailers of soybeans also assert claims. It would be a significant extension of *Sanner* to allow these plaintiffs to sue, and it is one we decline to make.

The Scrap Dealers repeatedly argue that there are no duplicate damages in this case because their pricing decisions are based exclusively on Comex prices rather than a pass-on of historical costs. We fail to see why this fact should lead us to ignore the Supreme Court's command to prevent the duplicate recovery of antitrust injuries wherever possible. *AGC,* 459 U.S. at 544; *Greater Rockford Energy & Tech. Corp. v. Shell Oil Co.,* 998 F.2d 391, 396 (7th Cir. 1993). The Scrap Dealers' contention that absent a pass-on of historical costs their injuries are "separate and distinct" defies economic reality. If a scrap dealer purchased a ton of copper when the Comex price was artificially inflated by $400, and the

price subsequently rose another $200 prior to resale, it has reaped a $200 gain, not a $400 loss. The Scrap Dealers' own witnesses admitted that there is no pass-on only "if the current Comex price has moved in an adverse direction." Yet the evidence shows that Sumitomo's actions caused the Comex price to rise throughout the period at issue in this case, making us skeptical that the Scrap Dealers have suffered any real loss at all.

The fact that the Scrap Dealers here are further down the chain of copper users than others also will increase the economic complexity of apportioning damages. Even the marketing manager of Loeb admitted that such factors as "freight costs, the sizing, sorting, packaging, purity requirements, length of time it took to get paid, [and] the risk of getting paid" all factored into Loeb's pricing decisions. While it might be possible for economists to factor out each of these considerations for all prior sales involving copper, the Supreme Court has decreed a simpler solution: simply restrict the right to recover to those who are more directly affected by the defendants' actions. *UtiliCorp*, 497 U.S. at 208-11 (noting policy rationales for denying recovery even to those plaintiffs whose damages could be easily calculated). This description applies fully to the plaintiffs here. Because the Scrap Dealers have suffered an indirect injury causing them at best speculative damages that would lead to a strong possibility of duplicative recovery, we agree with the district court that they may not pursue their claims.

B. *Viacom* and *Emerson* (No. 01-3485)

1.

Many of the successful arguments from *Loeb* are echoed by the defendants in the *Viacom* action, but after

a careful review of the record we find that the facts of the latter case compel a different result. The defendants' first argument for denying recovery to Viacom and Emerson (to whom we will refer as "Viacom" except when distinctions between the two companies are important) is that Viacom has shown no evidence of direct and predictable harm stemming from the defendants' conduct. As we stated earlier, directness relates to the question whether there exists a chain of causation between a defendant's action and a plaintiff's injury or (in contrast) if the connection is based instead only on "somewhat vaguely defined links." *AGC*, 459 U.S. at 540. Global and CLR, the only defendants remaining in the *Viacom* action after Sumitomo's settlement, begin their attack by pointing out that the prices of copper cathode on the LME and Comex often diverged. We fail to see why this matters. Sumitomo purchased futures on Comex to drive up the price on that particular exchange artificially, and the prices Viacom paid for copper were directly based on Comex prices. The fact that Sumitomo also bought and sold futures on the LME and may have caused additional harms to physical copper purchasers who based their decisions on LME prices has no impact on Viacom's ability to recover under the *AGC* factors.

Next, the defendants rely on the fact that Viacom's purchases included not only a price linked to Comex but "a variety of discounts or premiums that, in response to changes in supply and demand, varied over time and among suppliers." The defendants' experts have opined that, through adjustments of premiums in response to supply and demand factors, the actual impact on the physical copper market of their illegal futures market activities is likely to be indirect and unpredictable.

While all of this might be so as a theoretical matter, on summary judgment it is our duty to evaluate the evi-

dence in the record that Viacom presented. And that evidence paints a starkly different picture. Viacom has introduced into the record both its contracts and its suppliers' published premiums. After a careful review of these materials, we are convinced that Viacom has established direct injury. In its contracts, Viacom purchased all but a *de minimis* amount of copper through the two-part formula we described earlier, consisting of (1) a base price equal to the Comex first position copper settlement price, and (2) a cathode premium, negotiated on a monthly or quarterly basis. Over the six years at issue here, the settlement price fluctuated from about 75¢ to $1.40 per pound. During the same years, the premium ranged from 2.75 to 3.50¢/lb. (Viacom does not seek recovery based on changes in premium prices; the complaint is based only on those caused by variations in the base price.)

The district court ruled that the base price and cathode premium were "inseparable." After a careful review of the record in the light most favorable to the plaintiffs, we are unable to agree with this characterization. All of the contracts specify that the payment price is determined by adding these two separately described components, and the values of both numbers throughout the relevant time period should be available through discovery. The district court also seems to have thought that the premium could in some cases be a discount off the Comex price. There is no evidence to support this; to the contrary, all of the evidence, including defendants' counsels' concession at oral argument, indicates that the premium was always a positive number. While Viacom appears to have been awarded volume and cash payment discounts in some instances, there is no indication that these discounts were tied to market conditions, and the defendants do not focus on such discounts in their briefs.

Furthermore, the cathode premium was a small fraction of the Comex price. In fact, the evidence shows that as the Comex price increased, the premium also increased. Thus, there is no possibility that the two components "offset" or that the premium somehow compensated for the defendants' manipulated price inflation. (Even if, counter-factually, the Comex price had for example risen by 65¢ and, to compensate, the base price dropped a penny, this could at best represent a mitigation of damages. But this would not make the injury any less direct.) The district court's conclusion on this point, which relied mainly on the testimony of an expert who had not even looked at Viacom's contracts, is both factually mistaken and fails to take the evidence in the light most favorable to Viacom. The presence of a small cathode premium does not negate the fact that the prices of cathode and cathode futures "tend to move in lockstep." Instead, the price reference in Viacom's contracts supports just such lockstep linkage. Our case law has never required that the cash and futures prices be identical to support recovery. It is only necessary that the relationship be direct, as it is here. See *Sanner,* 62 F.2d at 929.

Furthermore, the experts note that Comex quotes 24 different exchange prices at any given time and that the defendants' actions could have affected each of those prices differently. Accepting the truth of this statement, we do not see why it compels a finding that Viacom's injury is indirect. According to the record evidence, out of this menu of prices, Viacom used just one (the monthly settlement price) as the basis for all but a minuscule number of its contract purchases, and Emerson used only two. While acknowledging this, the defendants contend that other cathode purchasers could have used different or widely varying systems. Perhaps they did, and if so perhaps they should be found to be

improper plaintiffs under the antitrust laws, though that is an issue for another day. But this fact does not weaken the direct causal chain between the defendants' actions and these particular plaintiffs' harm and is no more reason to deny Viacom and Emerson recovery than the fact that some purchasers might have bought cathode at prices not tied to those on either Comex or the LME.

Similarly, we reject the defendants' argument that because a number of Viacom's contracts contained clauses permitting the parties to renegotiate the base price if they believed that Comex prices did not accurately reflect market conditions, Viacom's injuries are somehow remote and indirect. It is undisputed that, because of the success of the defendants' conspiracy, Viacom and its integrated suppliers were never aware of the artificial Comex inflation and so never took advantage of this clause. Instead, Viacom based all of the purchases for which it seeks recovery directly on Comex.

We also believe that, contrary to the defendants' contentions, our holding on this point is entirely consistent with the Second Circuit's decision in *Reading Indus., Inc. v. Kennecott Copper Corp.*, 631 F.2d 10, 13-14 (2d Cir. 1980). There, the plaintiff, a refiner of scrap copper, alleged that the defendant-integrated producers had conspired to keep the price of refined copper low and that this conspiracy injured it by artificially raising the price of scrap. *Id.* at 12. The court found the injury indirect because it "depend[ed] upon a complicated series of market interactions," including the actions and pricing decisions of refiners, fabricators, dealers, speculators, and consumers of copper. *Id.* at 13. Such "conjectural theories of injury and attenuated economic causality" were enough to render Reading's injury indirect. *Id.* at 14.

Other than the fact that both *Reading* and the present case involve price-fixing conspiracies in the physical

copper market, we find little similarity between them. The injury here does not depend on the speculative actions of innumerable market decision makers. It flows instead directly from the contracts between Viacom and its suppliers. It is this contractual linkage, absent in *Reading*, that prevents other market variables from miring a trier of fact here in "intricate efforts to recreate the possible permutations in the causes and effects of a price change." *Id.*

In sum, Viacom's contracts and the other record evidence establish a direct relation between the defendants' illegal scheme and Viacom's harm. The contract price it paid its suppliers for copper was directly and explicitly based on the Comex monthly settlement price, and therefore the defendants' manipulations directly and predictably had an impact on that price. *Amarel v. Connell*, 102 F.3d 1494, 1512 (9th Cir. 1997) (injury direct where price of milled rice directly affected price of paddy rice); *Sanner*, 62 F.3d at 929. Any variations in the cathode premium moved in the same direction as the manipulation and could not have limited or mitigated this harm. For these reasons, Viacom has established the directness element of *AGC*.

2.

We turn next to the district court's other major reason for granting the defendants summary judgment: its belief that opening the door to Viacom's suit would inevitably lead to either duplicate recovery or complex damage apportionment. See *AGC*, 459 U.S. at 544. The court cited at least three manifestations of this problem, all involving Viacom's integrated suppliers, such as Asarco. First, it believed that Viacom's claim would duplicate Asarco's because Asarco could assert claims for its raw material purchases from third parties, and those raw

material prices are tied to Comex. Second, because Asarco purchased some cathode from third parties, both it and Viacom would be permitted to recover and duplicate each other's damages. Third, Viacom's claim would duplicate Asarco's because Asarco hedged by purchasing put options on Comex. In addition to those three points, the court noted that Asarco has recovered damages in a California state court class action, and it thought that this too should preclude Viacom from recovering.

We begin with the defendants' claim that Asarco's purchase of raw materials, such as ore, concentrate, blister, and anode, all of which it transformed into cathode, should bar recovery. This does not follow. Practically every product is created through the use of some kind of raw materials, but that fact does not prevent the direct purchaser of the finished product from suing its manufacturer under the antitrust laws, as long as the direct purchaser is not trying to attack a price-fixing arrangement at the raw materials level. The defendants' own experts testified that while raw material prices "may be indirectly affected" by price manipulations, a squeeze or corner on cathode—the only copper product traded on Comex and the LME—would not directly harm purchasers of these raw materials. Instead, raw material prices vary widely and contain various discounts off the Comex price to account for such factors as the expected cost of conversion into cathode, which in turn varies based on supply, demand, and current refining and smelting capacity.

We agree with the broad proposition that a party cannot recover when others more directly injured are better able to state a claim. *AGC*, 459 U.S. at 544-45. Indeed, we have just applied this very principle to deny recovery to the Scrap Dealers, who are farther down the chain of

resale, even though scrap prices too are tied to Comex. For parallel reasons, raw materials purchasers are also ill-suited to bring an antitrust claim. Permitting both raw materials purchasers and cathode purchasers in the same line of distribution to recover would lead to duplicate damages in violation of the *Illinois Brick* rule. The solution to this problem, however, is not to deny a right to recover to everyone. Such a draconian rule would give a green light to antitrust scofflaws to conspire to fix prices in a particular market and would create incentives to engage in antitrust conspiracies in markets with complicated distribution structures. Instead, the proper course is to recognize only the best of the several potential plaintiffs who otherwise satisfy the requirements for bringing suit under the antitrust laws. Because raw materials prices will vary in comparison to Comex prices much more than will the price of physical cathode, physical cathode purchasers such as Viacom are better situated than raw materials purchasers to pursue a claim in the physical market. This logically implies that raw materials purchasers up the chain from cathode sales could not satisfy *AGC*, just as we found to be the case for the downstream Scrap Dealers. In between, however, lies the physical market transaction at the heart of the defendants' scheme—the purchase of cathode. There are no better parties than these purchasers to pursue a claim, and it is therefore they who are proper plaintiffs.

More bite lies in the argument that recovery should be denied because some of the cathode Asarco sold Viacom was purchased before, although this claim is not as strong as it might at first appear. As the district court noted, some if not most of the cathode Viacom purchased had never before been purchased in cathode form. Asarco sold Viacom 510 million pounds of cathode between 1990 and 1996. During that time frame,

Asarco refined 6.4 billion pounds of cathode and purchased 153 million pounds from third parties, about 2.3% of its output. Because copper is fungible, one cannot tell whether any given Viacom purchase of cathode consisted of cathode refined by Asarco or previously purchased product.

We do not believe the mere existence of third-party cathode presents such a risk of duplicate recovery as to justify the extreme step of denying recovery altogether. Had the Board of Trade in *Sanner* produced evidence that farmers on some rare occasions bought soybeans from neighboring farms and then resold them along with the soybeans they grew themselves, that would not have provided a reason to deny recovery entirely. Similarly, if Viacom can prove at trial that 97.7% of all copper Asarco sold it was cathode it had refined itself, then Viacom should be permitted to recover 97.7% of its proved damages from cathode purchases. Cf. *Paper Sys., Inc. v. Nippon Paper Indus. Co.*, 281 F.3d 629, 633 (7th Cir. 2002) (carving out indirect purchases while still leaving open possibility of recovery for direct purchases). The physical copper market is complicated, but not so complicated that one cannot estimate to a reasonable degree of accuracy the amount of damage a party has sustained. It is certainly acceptable through expert economic testimony to make a reasonable estimation of actual damages through probability and inferences. See *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 124 (1969). "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty it would be a perversion of fundamental principles of justice to deny all relief to the injured person." *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931). While we are not permitted to make *complex* damage apportionments in

antitrust cases, *AGC*, 459 U.S. at 544, nothing about these calculations is inordinately complex. One need only know two pieces of information: the amount of cathode purchased by Viacom and the amount of cathode purchased and sold by those who sold cathode to Viacom. From there, reasonable estimates of damages are the order of the day. Because this estimation is not overly complex and will not lead to duplicate damages, it provides a sufficient basis at this stage for the case to proceed to the merits.

The defendants' next major attack rests on hedging. Commodities exchanges function in part to protect participants in a physical market by shifting some of the risk (and damage) caused by fluctuations in price to participants in the futures market. Extending this principle, Global and CLR claim that through an extremely complicated set of economic interactions between the cash and futures markets, the damages experienced in the physical cathode market will be duplicated in their entirety by damages suffered in the futures market. Therefore, only futures traders, and not cash market participants, should be permitted to recover.

The hedging theories advocated by the defendants are based on economic theory, with no specific application of that theory here that would correlate sales in the cash market and sales in the futures market. Notably, Viacom's individual purchases from its suppliers were not hedged. Neither Viacom nor Asarco purchased a futures contract as a hedge every time they exchanged copper. Had they done so, then perhaps one might be able to "match" each physical market transaction to a futures contract sale and argue that the opportunity for a trader to recover the overcharge in a federal lawsuit should preclude recovery for the overcharged physical market participant. Emerson's supplier, Phelps Dodge, did hedge

some of its sales to Emerson. On remand, the district court should explore further whether these hedging transactions would lead to some degree of duplicate recovery and a corresponding need to reduce damages. Nevertheless, since our review of the record indicates that not all of Phelps Dodge's sales were hedged, we conclude that Emerson is an appropriate plaintiff for the same reasons as Viacom.

In any event, the kind of futures matching the defendants' postulate does not reflect the way that most hedging works in the copper futures market. Asarco did not buy futures. Instead, it purchased put options. Put options are strategic hedges designed to protect against a general risk of declining cathode prices. With a put option, Asarco had the right, but not the obligation, to sell a futures contract if the price fell below a certain "strike" price. See *United States v. Catalfo,* 64 F.3d 1070, 1072 (7th Cir. 1995). But as the defendants were artificially inflating the price of cathode throughout the period at issue here, the price never would have fallen below the strike price. Therefore, no sale ever would have gone forward and the only damages Asarco would have suffered from the conspiracy would have been the cost of the put option, or, more properly, the amount by which the price of the put option changed because the price of copper was artificially high.

The defendants and their experts have made no attempt to correlate the damages Asarco could theoretically recover on the futures market for its put options to the specific damages sought here by Viacom, and the relationship is far from intuitively obvious. Instead, the experts trace the potential for hedging by numerous parties upstream and downstream from Viacom and contend that because so many participants in the copper industry use so many different forms of hedging there will be

"inevitable" duplication between the cash and futures markets.

This sort of potential duplication bears no resemblance to the duplication rejected in *Illinois Brick* and *AGC*, 459 U.S. at 544, nor do we think that it independently provides a reason to deny recovery to Viacom. In *Illinois Brick*, any "pass-on" of damages would (because of *Hanover Shoe)* already be taken into account in its entirety in the recovery to another potential party, the direct purchaser. 431 U.S. at 737-38. This simply is not the case here. Asarco strategically hedged only about half its output. The defendants claim that potential hedging by those parties to whom Viacom sold and from whom Asarco purchased raw materials is also relevant, but this cannot be so under *Sanner.* There we held that injuries incurred in futures market purchases not linked to any particular cash market purchases did not "duplicate" and were not more "direct" than the cash market injuries. 62 F.3d at 929-30. Because there are two separate markets, each with compensable injuries, the opportunity for recovery in one market does nothing to alleviate the harm in the other. For similar reasons, the fact that Comex futures traders have received money in a now-settled lawsuit says nothing about the ability of Viacom or other similarly situated plaintiffs in the cash market to recover.

Finally, the defendants note that Asarco and three of the manufacturers' other suppliers have recovered in a lawsuit brought in California state court. This lawsuit was brought pursuant to California law, which permits suit by indirect purchasers. *Union Carbide Corp. v. Superior Ct.*, 679 P.2d 14-16 (Cal. 1984). However, the supposed "duplication" here comes from different bodies in our federal system seeking to remedy separate harms. It presents no risk of duplicate recovery for the

same injury under the same law and is thus no bar to the plaintiffs' recovery. See *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989) (upholding award of both federal antitrust and state tort damages); *California v. ARC Am. Corp.*, 490 U.S. 93 (1989) (permitting states to require offenders to pay both state damages to indirect purchasers and federal treble damages to direct purchasers). If the resolution of the state court action poses a problem at all to these plaintiffs, it would be in the nature of claim or issue preclusion. See *Matsushita Electric Indus. Co. v. Epstein*, 516 U.S. 367 (1996); *Marrese v. American Acad. of Orthopaedic Surgeons*, 470 U.S. 373 (1985). It is possible that the defendants have waived their right to assert any such defense; it is not mentioned in their briefs before this court. Accordingly, we express no opinion at this time on the merits of any preclusion argument.

In sum, of all participants in the physical market, Viacom and other first purchasers of cathode are the only plaintiffs possibly situated to recover damages against the defendants for the anti-competitive harms they have inflicted on the physical market for copper cathode. Faced with the option of permitting a clear, non-speculative harm to the cash market to go unremedied or of allowing the plaintiffs' suit to go forward, we elect the latter. As narrowed to first purchases, there is no danger of duplication of recovery, and so, under *AGC* and *Sanner*, the claim should proceed to trial.

3.

The final broad claim of the defendants is that recovery of damages in this case simply would be too speculative and complex to warrant allowing this suit to proceed. Cf. *AGC*, 459 U.S. at 542. Based on the evidence adduced by Viacom, however, we disagree. The

main complication will come from attempting to discern how much of the Comex price of copper at a given time represented an overcharge due to the defendants' manipulation and how much stemmed from normal economic forces. This difficulty, however, occurs in every price-fixing case. It is no different from the task of gauging the damages recoverable by Comex futures traders, whom defendants have conceded to be proper plaintiffs. Through discovery, economic experts can evaluate the impact of the defendants' illegal actions on the futures market and come to reasoned conclusions. *Cf. Sanner*, 62 F.3d at 930 (rejecting claim that damages analysis in a market manipulation is "beyond the ken of the federal courts"). At that point, recovery could be calculated by reviewing all of Viacom's contracts (assuming they are similar to the ones already in the record) and assessing damages based on the already computed overcharge. Since the only other factors involved in setting the price of Viacom's cathode are items which have no relation to the Comex price, such as freight charges and cash payment discounts, and the cathode premium, for which Viacom does not seek to recover, there should be no problems as a theoretical matter with making these calculations. The mere fact that each individual transaction relevant to an antitrust scheme must be examined on a case-by-case basis to assess damages does not thereby render those damages speculative. *American Ad Mgmt., Inc. v. General Tel. Co. of Cal.*, 190 F.3d 1051, 1059 (9th Cir. 1999).

We fully recognize that perfecting such economic analysis, tracking every pound of cathode refined or purchased by Viacom's suppliers, and locating every cathode contract Viacom entered into over a six-year span will not be easy. But complex litigation is hardly new for the federal courts, whether it is in the field of antitrust,

environmental clean-ups, pension law, or accounting frauds. The key here is that the damages are not inherently speculative in the sense that *AGC* used that term. See 459 U.S. at 542. Nor, as in *Illinois Brick* or *Hanover Shoe*, is a party asking a jury or the district court to perform some form of econometric analysis to deduce whether all, some, or none of an overcharge was passed on down a chain of distribution. *Illinois Brick*, 431 U.S. at 727. Instead, one need only determine through available records what percentage of cathode bought by Viacom resents first purchases. This is not speculative or complex, only time-consuming, and we are confident that the parties and their counsel are up to the task.

The defendants' entire case theory, apparent not only here but also through their discussion of duplication and hedging, seems to be the troubling one because their scheme was *so* evil, went undetected for *so* long, and caused *so* much economic loss throughout the cash market, that we should simply give them a pass from the antitrust laws. This is not now and never has been the law. Since the days of *Eastman Kodak Co. v. Southern Photo Materials* Co., 273 U.S. 359, 379 (1927), it has been established that in complicated antitrust cases plaintiffs are permitted to use estimates and analysis to calculate a reasonable approximation of their damages. While we fully agree that we should not use the massiveness of defendants' conspiracy as an excuse to punish them unduly (by, for example, permitting the Scrap Dealers in *Loeb* to recover for harms that would duplicate those of Viacom), the sensible solution is to let one—but only one—level of purchasers in the physical copper market recover. Based on all the evidence available on summary judgment, the best plaintiff in this market is the first purchaser of copper cathode, and Viacom and Emerson are prototypical examples of such plain-

tiffs. The district court erred in dismissing the case at this stage, and we must therefore reverse its judgment.

C. *Ocean View* (Nos. 01-3229, 01-3230)

We turn to the final plaintiff, Ocean View. We have already rejected the defendants' principal argument for affirming summary judgment in this case, that the action is barred by the *Illinois Brick* direct purchaser rule. For the same reasons discussed in connection with Viacom's action, there is no party along a chain of distribution between Ocean View and any of the defendants who can recover for an alleged overcharge. Therefore, *Illinois Brick* is inapplicable. Instead, this case is controlled by the basic premise of *Sanner*, 62 F.3d at 929-30, which holds that a cash market participant injured by a party's illegal actions in the futures market may, in some instances, sue that party under the federal antitrust laws. The controlling factors in this inquiry are those set out in *AGC*, 459 U.S. at 537-45. The defendants allege that under an analysis of these factors, Ocean View's claim should still be precluded, while Ocean View contends that it should be entitled to recover for every copper rod it has ever purchased, or, in the alternative, that it may recover at least for those instances where it was the first purchaser of copper in cathode form.

As with the Scrap Dealers, we must reject Ocean View's proposition that it can recover for rod manufactured from cathode purchased by others, such as its semi-fabricators. Such an injury would be indirect because the semi-fabricator would serve as a more immediate victim of the antitrust violation intended to affect the cash and futures markets for cathode. *AGC*, 459 U.S. at 541-42; *supra* at 22-23. Se mi-fabricators who purchased cathode would stand in shoes similar to those of Viacom, purchasing large quantities of cathode to reshape and sell as rod or

wire. Because they are well-situated to bring any claim for inflation in the physical market, there is no need for Ocean View, as a more remote party, to step in "to vindicate the public interest in antitrust enforcement." *AGC*, 459 U.S. at 542.

Additionally, granting recovery to both a semi-fabricator for its cathode purchase and Ocean View for its purchase of that same cathode reshaped as rod would lead to either duplicate recovery or complex damage apportionment in violation of the principles underlying *AGC*. 459 U.S. at 544. We have already rejected the claim that the copper market should not be subject to a ban on duplicate recovery because copper pricing decisions are based on Comex and not a "pass on" of historical costs, *supra* at 24-25. To avoid such duplicate recovery one must either attempt to apportion damages along a chain of distribution, forbidden by *AGC*, or deny the right to sue to all but one plaintiff along the chain of distribution.

The best-situated plaintiff to recover is the first purchaser of copper cathode, the specific commodity the defendants targeted in their futures market conspiracy. For such a plaintiff, it is possible both to avoid duplicate recovery problems and at the same time to ensure that antitrust harm perpetrated in the cash market will not go unremedied. Based upon on our review of the record, we are satisfied that in at least some cases Ocean View did purchase cathode refined by integrated producers. The existence of such purchases is enough to get Ocean View in the door; recovery should not be denied simply because a plaintiff may not receive damages as high as it would like. The quantity of such sales, and thus the eventual damages Ocean View might get if it manages to prove the rest of its case, can await further discovery. Like Viacom, Ocean View will have the burden of ascer-

taining what percentage of the cathode sold by these producers was refined by them and not purchased from third parties. If, as defendants fear, many of these records are lost, that fact will come out in discovery, and they may move for a missing evidence instruction or perhaps even summary judgment on the merits.

We have already rejected most of the other claims the defendants make for denying Ocean View recovery, including the proposition that the integrated producers' purchase of copper raw materials should somehow render them improper plaintiffs, *supra* at 31, and the claim that hedging on the copper futures markets by some physical market participants renders the injury indirect or duplicative, *supra* at 34-36. Finally, we have found that the damages claimed are not too speculative or complex, *supra* at 37-38.

At this point we can think of only one possible distinction between Ocean View and Viacom that deserves further comment. That is the fact that while Viacom purchased cathode, Ocean View bought cathode that had been tolled into rod. The parties do not focus on this distinction much in their briefs, and the defendants concede that there is no physical difference between cathode and rod other than the product's shape. Based upon our review of the contracts in the record, the price Ocean View paid its integrated producers for rod appears to be identical to that paid by Viacom for cathode except for the existence of an additional rod premium. We assume, since the defendants do not contend otherwise, that like the cathode premium, the rod premium is a small fraction of the total price paid and tends to increase as the Comex price increases, so that it does not in some way offset the Comex inflation or render the injury indirect. In that case, the similarities between cathode and rod are close enough that, in instances where the same inte-

grated producer refines raw materials into cathode and then shapes it into rod, Ocean View, as the first purchaser after the materials are formed into cathode, can state a claim, regardless of whether that copper is then in the form of cathode or rod. *Cf. In re Sugar Indus. Antitrust Litig.*, 579 F.2d 13, 17-18 (3d Cir. 1978) (finding no distinction for *AGC* purposes between price-fixed sugar and candy incorporating that price-fixed sugar sold into the market for the first time).

VI.

In addition to their points under *Illinois Brick* and *AGC*, the various plaintiffs make arguments specific to their own cases. Most of these involve procedural issues. We consider these points in turn, on an issue-by-issue basis.

A. RICO and State Law Claims

We begin once again with the *Loeb* action. Our determination that the *AGC* factors prevent the Scrap Dealers from pursuing their antitrust claims disposes of their remaining claims against Sumitomo and Global for violations of RICO and state law. It is also dispositive of all claims against JPMorgan Chase.

The district court dismissed the Scrap Dealers' RICO claims on the ground that the *AGC* factors apply equally to RICO. The Scrap Dealers, however, argue that even if their antitrust claim fails, their RICO case should proceed. This claim lacks merit. Civil RICO was modeled after the Clayton Act. *Holmes v. Security Investor Protection Corp.*, 503 U.S. 258, 267-69 (1992). To satisfy its requirement of proximate causation, the Scrap Dealers must allege a relation between their injury and the defendants' violation that is neither indirect nor remote.

International Bhd. of Teamsters, Local 734 Health & Welfare Trust Fund v. Phillip Morris, Inc., 196 F.3d 818, 825 (7th Cir. 1999) (applying *AGC* factors to a proximate causation analysis). Since we have already determined that the Scrap Dealers' injury is too indirect and remote under *AGC* for antitrust purposes, we conclude that the relation is similarly too remote for RICO purposes.

The Scrap Dealers also assert that the district court erred in finding that they had abandoned their state law claims. On this point, they appear to be correct. There is certainly no evidence in the record that the Scrap Dealers voluntarily dismissed or failed to pursue their various state law claims. The defendants argue that these claims were abandoned when the Scrap Dealers attempted to certify a class for the federal antitrust claims but not for the state claims. But no inference of abandonment should flow from a limited request for a class action; to the contrary, FED. R. Civ. P. 23(c)(4)(A) specifically recognizes that "an action may be brought or maintained as a class action with respect to particular issues." It would be entirely consistent with the rule to seek certification on issues governed by federal law, while declining to do so for more particularized state law issues. Nevertheless, the fact remains that we have dismissed all of the Scrap Dealers' federal claims against Sumitomo and Global. Since the Scrap Dealers have asserted no independent basis for federal subject matter jurisdiction, it is entirely appropriate to dismiss the state law claims, though without prejudice. See 28 U.S.C. § 1367(c)(3); *Oates v. Discovery Zone*, 116 F.3d 1161, 1173 n.12 (7th Cir. 1997).

B. Issue Preclusion: JPMorgan Chase

The district court dismissed the Scrap Dealers' claims against JPMorgan Chase on issue preclusion grounds. To

prove that issue preclusion applies, the defendant must establish that (1) the plaintiff was fully represented in the prior litigation, (2) the issues to be precluded are identical to those in the prior litigation, (3) the issues were actually litigated and decided on the merits, and (4) resolution of the issue was necessary to the judgment. *People Who Care v. Rockford Bd. of Educ.*, 68 F.3d 172, 178 (7th Cir. 1995). The Scrap Dealers' claims against JPMorgan Chase arise from an alleged conspiracy between JPMorgan Chase and Sumitomo in which JPMorgan Chase's metals desk somehow furthered the conspiracy through its own copper purchases on the LME. The issue the defendants sought to preclude, that of the Scrap Dealers' ability to recover as a proper plaintiff under the antitrust laws, was actually litigated and decided on the merits in their suit against Sumitomo. That is enough to bind the Scrap Dealers, who have now had their day in court, with respect to JPMorgan Chase as well.

The Scrap Dealers argue, however, that their day in court was flawed, because they did not have an opportunity to litigate these issues fully before the district court. Their only support for this contention is the fact that the district court turned Sumitomo's motion to dismiss into a summary judgment motion without notice to them. As we have already noted, this action by the district court, while in error, did not prejudice the Scrap Dealers. The antitrust issues were fully litigated by counsel, albeit at the class certification stage. Besides this, the district court gave the Scrap Dealers an opportunity for a hearing prior to dismissing the JPMorgan Chase claims at which they were invited to bring forth any additional arguments that would call into question the district court's prior grant of judgment to the defendants. The Scrap Dealers produced no new evidence at

that time that would call into question the factual basis for that determination. Therefore, we affirm the district court's decision to dismiss all claims brought by the Scrap Dealers against JPMorgan Chase on issue preclusion grounds.

C. Statement of Claim Against CLR

CLR advances one final argument in support of the judgment in both *Viacom* and *Ocean View*, which applies only to itself and not to its co-defendants. The district court stated in the *Viacom* action that, while it would not "address the issue in any detail," it believed that Viacom had made an inadequate showing that CLR's activities in any way affected the prices Viacom paid for copper. CLR urges this as an alternate ground for affirmance.

The procedural history of this argument is complex and seems to have engendered a great deal of enmity between the parties. The parties filed cross-motions for summary judgment on the standing question in the *Viacom* action. In its lengthy joint motion with Global, CLR never argued that its role in the conspiracy was too attenuated to have directly affected the Comex price. The issue was first raised in CLR's response to Viacom's cross-motion. Viacom, in reply, pointed to evidence in the record that addressed this new argument. The district court struck these submissions as untimely. This, however, was in error. Viacom had no obligation to produce specific evidence of CLR's role to survive CLR's motion for summary judgment since the issue was never raised by CLR at that stage. *Aviles v. Cornell Forge Co.*, 183 F.3d 598, 604-05 (7th Cir. 1999). Because CLR raised this argument in an untimely manner, the district court should not have considered it as a ground for summary judgment without giving Viacom "notice and a fair oppor-

tunity to present arguments and evidence in response." *Id.* By striking the materials Viacom submitted, the district court denied just that opportunity. Of course, since we are remanding this case on other grounds, the issue may resurface again after further discovery. At that point, considering all evidence in the record, the district court may properly evaluate—after considering all record evidence—whether either Viacom or Ocean View has presented enough to connect CLR to any violation of the antitrust laws. For the foregoing reasons, we also deny CLR's motion to strike.

D. Aiding and Abetting: JPMorgan Chase

Another minor issue crops up only in *Ocean View,* but it too can be disposed of easily. JPMorgan Chase asserts that the district court incorrectly denied its motion to dismiss on the ground that the complaint failed to state a claim against it because it only aided and abetted the conspiracy between Sumitomo and Global. But Ocean View is not attempting to state an "aiding and abetting" case. Its allegation is that JPMorgan Chase was a participant in the conspiracy to manipulate the copper market. To state such a claim, Ocean View need only prove that JPMorgan Chase knew Sumitomo intended to restrain trade, intended that trade be restrained, and materially contributed to that restraint. 7 Phillip E. Areeda, *Antitrust Law: An Analysis of Antitrust Principles and Their Application,* ¶ 1474a (1986); *Poller v. Columbia Broad. Sys., Inc.,* 368 U.S. 464, 470 (1962). A broad reading of the complaint alleges this and more. It states that JPMorgan Chase, aware that Sumitomo was manipulating futures prices, provided services and loans at well above-market prices to finance and hide Sumitomo's activities. JPMorgan Chase also allegedly stonewalled and lied to regulators and otherwise helped Sumitomo in

an attempt to avoid investigations, all the while profiting handsomely on its deal. Of course, after merits discovery, it may come to pass that Ocean View lacks the evidence to establish any of these claims. But accepting the allegations as true, it is entitled to proceed.

E. Reinstatement of Claims

Only a few brief housekeeping matters remain. In both *Viacom* and *Ocean View*, the district court also granted the defendants summary judgment on their RICO and fraud claims because RICO contains rules similar to the Clayton Act for identifying proper plaintiffs. *International Bhd. of Teamsters*, 196 F.3d at 825. Having found that the plaintiffs here may pursue their antitrust claims, the RICO claims must be reinstated as well. The same goes for the state law claims. They were dismissed without prejudice in *Viacom* only because all federal claims had dropped out of the case. Finally, in *Ocean View*, the district court dismissed Ocean View's claim under Rhode Island state law on the ground that Rhode Island law imposed standing requirements similar to those of federal law. Expressing no opinion on the merits of that determination, we note that since we have found that Ocean View may proceed on at least some of its claims under federal law, the dismissal of the Rhode Island claim on similar grounds must be reconsidered.

VII.

To summarize, we MODIFY the dismissal of the state law claims in No. 00-3979 to reflect that this dismissal was without prejudice. In all other respects we AFFIRM the judgment of the district court. We also AFFIRM the judgment in No. 01-1148. On the other hand, we find that Viacom, Emerson, and Ocean View are not indirect

purchasers under *Illinois Brick,* and their injury is direct, predictable, and unlikely to produce duplicate recovery or speculative damages. Therefore, in Nos. 01-3229, 01-3230, and 01-3485, we REVERSE the judgment of the district court and REMAND for further proceedings.

CUDAHY, *Circuit Judge,* concurring in Nos. 00-3979 and 01-1148 and concurring in the judgments in Nos. 01-3485, 01-3229 and 01-3230. 1 join in the outcomes reached by the majority in the several cases, but I write separately to question the appropriateness of finding a "lockstep" relationship between the copper futures and cash markets in the analysis of the claims of Viacom, Emerson and Ocean View.

The analysis and outcome in *Sanner* (which relied on the allegations of a complaint, not a summary judgment record) were based on the thesis that the futures market and the cash market tended to move in "lockstep." Thus, the relationship of futures prices of soybeans on the Chicago Board of Trade and the cash price of soybeans to be realized by farmers could be assumed to be simple, direct and absolutely predictable. "The futures market and the cash market for soybeans are . . . 'so closely related' that the distinction between them is of no consequence to antitrust standing analysis." 62 F.3d at 929. Based on the complaint, there could be no question that a given manipulation of the futures market produced a precisely proportionate consequence in the cash market.

This is hardly the case with the Comex and the market for physical copper. Even though the majority attempts to minimize the departures from a fully direct relationship between the futures and the physicals market (and takes issue with the more critical analysis of these rela-

tionships by the district court), under either view "lockstep" becomes more a slogan than a fact. And, of course, it was the existence of a "lockstep" relation that apparently excused *Sanner* from the strictures of *Illinois Brick v. Illinois,* 431 U.S. 720 (1977) and squared it with *Associated General Contractors of California, Inc. v. California State Council of Carpenters,* 459 U.S. 519 (1983). The existence, in the case before us, of a negotiable premium (or discount) as part of the price is enough in itself to remove this relationship from the "lockstep" category. And, if the language of *Kansas v. Utilicorp United, Inc.,* 497 U.S. 199, 216 (1990) about the undesirability of exceptions to *Illinois Brick* were to be applied here, the outcome might be in doubt.

With respect to the possibility of duplicative recovery, *Sanner is* also quite distinguishable. There the plaintiff-farmers produced the commodity, bought none of it and there was no trade in any precursor raw material. Here the plaintiff-manufacturers bought from integrated producers, which purchased from others substantial quantities of copper cathode and pre-cathode copper raw material (the price of which also tended to follow the copper futures market).

I believe, therefore, that the case before us, although it seeks to apply *Sanner's* principle, may be a major step beyond *Sanner.* The outcome, however, may be justified insofar as there is sufficient evidence that the defendants engaged in massive physical cathode transactions and intended to manipulate physical prices as well as futures prices and thus to injure purchasers such as the plaintiffs. *See Sanner,* 62 F.3d at 929 ("even if we were to assume . . . that there is a distinction between markets that is relevant to antitrust standing, the farmers here have alleged that one of the CBOT's objectives in adopt-

ing the Resolution was to prompt a price decline in the cash market for soybeans.").

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Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

January 30, 2003

Nos. 99 C 801, 00 C 528 & 99 C 621

BARBARA B. CRABB, *Chief Judge.*

Before:

HON. RICHARD D. CUDAHY, *Circuit Judge*
HON. ILANA DIAMOND ROVNER, *Circuit Judge*
HON. DIANE P. WOOD, *Circuit Judge*

Appeals from the United States District Court
for the Western District of Wisconsin

Nos. 01-3229 & 01-3230

OCEAN VIEW CAPITAL, INCORPORATED,
formerly known as TRIANGLE WIRE & CABLE, INC.,

Plaintiff-Appellant,

—v.—

SUMITOMO CORPORATION OF AMERICA, SUMITOMO CORPORATION, GLOBAL MINERALS AND METALS CORPORATION, *et al.*,

Defendants-Appellees.

No. 01-3485

VIACOM, INC. as successor by Merger to CBS CORP. (F/K/A WESTINGHOUSE ELECTRIC CORP.), and EMERSON ELECTRIC CO.,

Plaintiffs-Appellants,

—v.—

GLOBAL MINERALS AND METALS CORPORATION and CREDIT LYONNAIS ROUSE, LTD.,

Defendants-Appellees.

ORDER

On consideration of the petitions for rehearing and petitions for rehearing *en banc*, no judge in active service has requested a vote* on the petitions for rehearing *en banc* and all of the judges on the original panel have voted to deny the petitions for rehearing. It is, therefore, ORDERED that these petitions for rehearing and rehearing *en banc* are DENIED.

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* Chief Judge Joel M. Flaum did not participate in consideration of these petitions.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

M.D.L. DOCKET NO. 1303
OPINION AND ORDER

IN RE COPPER ANTITRUST LITIGATION

99-C-0801-C

OCEAN VIEW CAPITAL, INC.,
f/k/a TRIANGLE WIRE & CABLE, INC.,

Plaintiff,

—v.—

SUMITOMO CORPORATION OF AMERICA, SUMITOMO CORPORATION, SUMITOMO FUTURES CORPORATION, GLOBAL MINERALS AND METALS CORPORATION, DAVID CAMPBELL, and CREDIT LYONNAIS ROUSE,

Defendants.

00-C-0528-C

OCEAN VIEW CAPITAL, INC.,
f/k/a TRIANGLE WIRE & CABLE, INC.,

Plaintiff,

—v.—

J.P. MORGAN & CO., INCORPORATED and
MORGAN GUARANTY TRUST COMPANY OF NEW YORK,

Defendants.

Plaintiff Ocean View Capital, Inc. brought these two antitrust actions for damages, alleging in Case No. 99-C-0801-C that it had been injured by conspiratorial actions taken by defendants Sumitomo Corporation of America, Sumitomo Corporation, Sumitomo Futures Corporation, Global Metals and Minerals Corporation, David Campbell and Credit Lyonnais Rouse in violation of the antitrust laws of the United States. It alleged that "[b]eginning in 1990, if not earlier, and continuing through June 13, 1996, defendants conspired to manipulate and corner and did manipulate and corner the market for physical copper and copper futures." Amended Compl., ¶ 22. Plaintiff sued defendants J.P. Morgan & Co., Incorporated and Morgan Guaranty Trust Company of New York in Case No. 00-C-0528-C for participating in the conspiracy and helping to effectuate it by providing capital to the Sumitomo defendants and helping to conceal the existence of the conspiracy. Plaintiff alleged that defendants' actions had caused it harm because it had been forced to pay higher prices for the physical copper it purchased as a direct and predictable

consequence of the manipulation of the futures market and the cornering of the physical market for copper. The cases were consolidated with others in this court by order of the Judicial Panel on Multidistrict Litigation. Jurisdiction is present. 28 U.S.C. § 1331, 15 U.S.C. § 15.

The two cases are now before the court on motions for summary judgment filed by all defendants, who contend that plaintiff lacks standing under the antitrust laws to bring this action. Defendants acknowledge that the allegations of plaintiff Ocean View Capital's original complaint were sufficient to survive a motion to dismiss for failure to state a claim, *see In re Copper Antitrust Litigation*, 98 F. Supp. 2d 1039 (2000), but assert that with the completion of discovery on the standing issues, it has become evident that plaintiff lacks antitrust standing. The Morgan defendants advance the same arguments as the other defendants. In addition, they have moved to dismiss the complaint against them on the ground that plaintiff's allegations do not state an antitrust violation against them. I conclude that plaintiff lacks antitrust standing to bring an antitrust action against the moving defendants in both cases for a variety of reasons, including the indirectness of plaintiff's injury and the difficulty of calculating the damages to which it would be entitled. Therefore, I will grant defendants' motions for summary judgment. Plaintiff made a request in its brief for summary judgment in its favor but has shown no reason why its request should be granted. Its unsupported motion for summary judgment will be denied. The disposition of the other motions makes it unnecessary to address the Morgan defendants' motion to dismiss, which is based on its contention that plaintiff has failed to allege an antitrust violation against them.

From the facts proposed by the parties, I find that the following are material and undisputed.

UNDISPUTED FACTS

A. *The Parties*

Plaintiff Ocean View Capital, Inc., f/k/a Triangle Wire & Cable, Inc., is a corporation organized and existing under the laws of Delaware, with its principal place of business in Rhode Island. Between 1990 and 1996, plaintiff was engaged in the manufacture of copper wire and cable. Defendant Sumitomo Corporation of America is a corporation organized and existing under the laws of New York with its principal place of business in New York. Defendant Sumitomo Corporation is a corporation organized and existing under the laws of Japan with its principal place of business there. Defendant Sumitomo Corporation Futures, Inc. is a corporation organized and existing under the laws of Delaware. Defendant Global Minerals and Metals Corporation is a corporation organized and existing under the laws of Delaware. It is a trader of physical copper and copper futures. Defendant David Campbell was a principal of Global at times relevant to this suit. Defendant Credit Lyonnais Rouse is a foreign corporation authorized to do business in the state of New York.

B. *The Copper Market*

1. *Production of copper*

In manufacturing building wire, cable and other copper products, plaintiff used copper rod, which is fabricated from copper cathode. Between 1990 and 1996, the vast majority of copper rod was manufactured in a four-step process. The first step involved extracting copper ore from a mine and placing it in a concentrator to be crushed, milled and treated with a variety of chemicals

to extract the minerals and then turned into a powder or gravel-like substance called copper concentrate, which is between 18 to 50% copper. The second step of the process is smelting, which separates the nonferrous metals in the copper concentrate from other minerals, such as sulfur and iron. Smelters also melt and process various forms of copper scrap, such as the copper that remains unused when copper rod is made into copper wire as well as used copper wire itself. Smelters produce "blister" or "anode" from concentrate and scrap. Anode products are one-meter square plates of approximately 98 to 99% copper.

In the third step of the manufacturing process, anode (or blister or copper scrap) is refined electrolytically in a tank of electrolyte containing sulfuric acid and other chemicals. A "starter sheet" of pure copper is placed in a tank where an electrical charge is passed through the electrolyte for several days, causing the copper atoms from the anode to migrate through the acid and accumulate on the starter sheet. The final product is a one-meter square plate, "copper cathode," that is more than 99% copper. In the fourth step, continuous cast copper rod is fabricated from cathode at a rod mill, where cathode or scrap or both are fed into a furnace and melted as they descend through the furnace. At the bottom, spouts direct the molten metal onto a casting wheel that produces a solid bar of copper, which is then processed through a series of dies that gradually reduce the size of the bar to a 5/16" diameter. In terms of chemical composition, the rod is identical to copper cathode; only its appearance has changed.

2. *Market participants*

Players in the copper market include integrated producers, semi-fabricators, producers, traders, scrap deal-

ers and end users, among others. Integrated producers extract copper ore from mines and process it through the stages of concentrate, blister, anode and cathode. Some have the facilities to fabricate cathode into rod. Despite their ownership of production facilities, producers routinely supplement their own production with scrap, concentrate, blister, anode, cathode and rod bought from unaffiliated producers and traders or from affiliated facilities in which they own partial interests. As a general rule, in buying from affiliated facilities, the producer pays the same price for copper that an unaffiliated entity would pay.

The producers that sold rod to plaintiff owned rod mills. Other rod mills exist that are owned by independent companies known as "semi-fabricators." These semi-fabricators obtain cathode and scrap from producers or trading companies and make it into rod. In addition, they will accept cathode from manufacturers such as plaintiff and convert it into rod for a fabrication fee under an arrangement known as "tolling."

Integrated producers purchase copper from outside sources for a number of reasons. First, the copper is expensive to move. In many instances, it is more economical for the producer to purchase copper from a third party near the delivery point than to transport it. Second, marketing opportunities may arise that a producer cannot exploit if it relies solely on its own production capacity or if it has oversold product in advance or if it is undergoing renovation or expansion of its production facilities. Third, there may be mismatches among a producer's facilities. The mines might not be producing enough ore to keep the smelters operating efficiently or the smelter not making enough blister to fill the refinery's capacity. Fourth, a facility might be temporarily

inoperable as a result of flood, earthquake, strike or other unforeseen event.

Trading companies buy and sell copper in the form of concentrate, anode, blister, cathode and scrap but do not own or operate any facilities to process copper. All of the trading companies that sold copper to plaintiff purchased the copper from producers, semi-fabricators and other trading companies.

Semi-fabricators own and operate rod mills or convert cathode into tubing or rod into wire. Like traders, semi-fabricators do not own mines or concentrators and generally do not own smelters or refineries. Semi-fabricators purchase cathode from producers and traders and fabricate the cathode into rod. Some semi-fabricators have the facilities to convert scrap into cathode, which they then fabricate into rod. In addition, semi-fabricators enter into "tolling arrangements" with customers under which they use cathode supplied by the customer to produce rod. In those situations, the semi-fabricator charges the customer only for the cost of conversion and delivery (the rod premium).

3. *Copper pricing*

On a daily basis, producers, traders, semi-fabricators, scrap dealers and end-users such as plaintiff buy and sell copper in the form of concentrate, blister, anode, cathode, rod and scrap at prices set with reference to the copper prices on the Commodity Exchange, Inc. division of the New York Mercantile Exchange (Comex) or the London Metal Exchange. Between 1990 and 1996, plaintiff purchased copper in the form of rod and cathode. Plaintiff was not trading on the futures exchanges allegedly manipulated by defendants.

Plaintiff "tolled" most of the cathode it purchased with rod mills pursuant to tolling agreements. Also, it

purchased cathode that it resold at a profit. In all these sale and re-sale transactions, the purchase price of the cathode was set with reference to Comex.

Most of the copper plaintiff purchased was in the form of rod that it used to manufacture building wire and other products. The price it paid for rod was based on a formula that was a combination of four elements: 1) an exchange-based price formula; 2) a cathode premium; 3) a rod or "shaping" premium; and 4) shipping charges. The exchange-based price formula was set with reference to Comex.

The cathode premium was designed to account for the difference between buying a single contract on the Comex for an unknown brand of copper at an unknown Comex warehouse location and buying a known brand of copper on a known date with a known quality, as well as more favorable payment terms. The premium was influenced by market forces such as perceptions of supply and demand and the prices competitors were charging. Like the cathode premium, the rod premium was influenced by market forces of supply and demand and reflected factors such as the cost of conversion of cathode into rod.

The shipping charge was the cost of shipping the rod to plaintiff. It could vary with transportation rates and the availability of discounts offered by the supplier. These might be proximity discounts determined by the distance from the supplier, the creditworthiness of the buyer, the supplier's interest in gaining the buyer's business and other offers the buyer might have received. Plaintiff negotiated the cathode and rod premiums and shipping charges with each supplier separately.

In manufacturing building wire and cable, plaintiff produced scrap copper, some of which it sold to scrap dealers for cash at prices set by reference to Comex.

Also, plaintiff exchanged scrap copper for copper cathode that it tolled with rod mills or producers. The value of the scrap copper was set by reference to the published scrap prices that were set by reference to Comex.

Although the prices of all forms of physical copper are set by reference to prices on the futures markets, there is no single Comex or London Metal Exchange price quoted and used by all physical market participants at any one time. Comex quotes 24 different prices, one each for delivery in the present month and each month up to two years in the future. Participants in the physical copper market also use Comex intra-day prices to set the prices of the copper they buy and sell. Purchasers of physical copper utilize a variety of exchange based formulas to set the price of the copper at the same time in light of their own particular pricing strategies, which are driven by their own views of supply and demand. For example, between 1990 and 1996, cathode and rod were bought and sold utilizing such formulas among others as 1) the Comex month average price for the month of delivery; 2) the Comex price at a particular time during the month of delivery; 3) forward fixed pricing; and 4) the previous day's Comex closing price. At various times between 1990 and 1996, plaintiff used each of these formulas to set the price of the rod it purchased. To various degrees, the pricing formula employed will protect the purchaser from the effects of a manipulation of the underlying index that is used as reference point.

The premiums and discounts that are components of the price of various forms of physical copper are heavily influenced by market forces of supply and demand and will vary over time and from supplier to supplier. The effect of changes in Comex or the London Metal Exchange prices on the prices that purchasers pay for physical copper will therefore vary over time (and

between suppliers) because those prices are affected directly by supply and demand factors as well as published exchange prices.

The numerous exchange-based pricing formulas used in the purchase of physical copper and the existence of market-driven premiums and discounts that vary over time and among suppliers mean that the effects of a futures market manipulation would be neither direct nor predictable. For example, the prices paid for physical copper delivered in July 1995 could have varied by as much as 90%, depending on which pricing formulas were used. According to fundamental principles of economic theory, physical prices tend to diverge from futures market prices, rather than exhibit a direct and predictable cause and effect relationship.

The primary product that plaintiff bought between 1990 and 1996 was continuous cast copper rod. During that time period, continuous cast copper rod was not traded on the London Metal Exchange or Comex or stored in exchange warehouses.

C. *Plaintiff's Suppliers*

1. *Magma Metals Corporation*

Between 1990 and 1996, plaintiff purchased rod from Magma Metals Corporation. In 1996, Magma was acquired by BHP Copper, Inc. Plaintiff continued to make purchases from BHP. (I will refer to both corporations as Magma.) Magma owned and operated mines in the United States, as well as a smelter, refinery and rod mill. It purchased copper in various forms from third parties in order to make cathode and rod and sell them to its customers such as plaintiff. Between 1990 and 1996, Magma purchased concentrate both from traders and from numerous third parties, including Asarco, Cyprus

Minerals, Cananea Mines, Grupo Mexico, Kennecott and BHP. Magma acquired concentrate from 23 different mines, five of which it owned in full, two of which it owned in part and 16 in which it had no ownership interest. Magma made these third-party purchases because its own smelter's capacity was substantially larger than the production capacity of its mines and because it was not economically feasible to operate the smelter at less than full capacity. Magma's purchases from non-affiliated smelters (those in which it had no ownership interest) and traders accounted for between 37 and 40% of the concentrate it used in its refining operations. The price it paid for concentrate was set with reference to either Comex or the London Metal Exchange, less refining and treatment charges that were negotiated by the parties.

Magma sold copper concentrate to producers and dealers, including Metals & Commodity, Glencore, Cyprus, Kennecott, Phelps Dodge, Metals Concentrates International, Inc. and Asarco.

Between 1990 and 1996, Magma purchased blister from third parties, such as Cox Creek Refining Corporation and Kennecott and used it to make cathode. It purchased anode from third parties such as Kennecott and sold it to third parties such as Cyprus, Kennecott, Phelps Dodge, Southwire and Noranda. It used the anode it purchased to make copper cathode. In addition, Magma purchased copper scrap from traders and processed it into cathode. Although it produced cathode, it also purchased a substantial amount of cathode from third parties in order to fulfill its obligations to its cathode customers. It also fabricated some of this cathode, including Magma brand cathode it repurchased from third parties, into rod that it sold to its rod customers such as plaintiff. The prices Magma paid for the anode, blister, cathode and scrap were set with reference to either Comex or the

London Metal Exchange. The price at which it sold anode was set with reference to either Comex or the London Metal Exchange.

2. *ASARCO Incorporated*

Between 1990 and 1996, plaintiff purchased copper from ASARCO Incorporated, primarily in the form of rod but also as cathode. Asarco owned and operated copper mines, smelters, refineries and rod mills in the United States. Although it was a copper producer, it purchased copper in various forms from third parties in order to make the cathode and rod that it sold to plaintiff and others. Asarco purchased concentrate from producers and traders because the capacity of its smelters was larger than that of its mines. Although Asarco wholly owned three mines in Arizona and had partial interests in 13 other mines in North and South America, it obtained concentrates from 50 mines around the world, as well as from traders. Asarco obtained blister and anode from 12 different smelters. Two of these were wholly owned by Asarco, three were partially owned and the remainder were not affiliated with Asarco. Asarco made the purchases because the capacity of its refinery exceeded the capacity of its smelters. Asarco also purchased small amounts of scrap for use in making cathode. Between 1990 and 1996, Asarco's purchases of concentrate, anode, blister and scrap from non-affiliated sources accounted for at least 41% of the copper that Asarco used to make its own brand of cathode at its Amarillo refinery. The prices Asarco paid for the concentrate, anode and scrap it purchased were set by reference to Comex.

Between 1990 and 1996, Asarco purchased cathode from third parties. In some instances, it repurchased its own brand of cathode. It tended to oversell its maximum

production capacity by two to three percent each month in the expectation that a number of its purchasers would buy less than they had contracted for and it preferred to use its own brand of cathode for delivery to Amarillo for rod fabrication. Between January 1993 and June 1996, Asarco purchased at least 153,000,000 pounds of cathode for delivery to its Amarillo facility. As a general rule, the price Asarco paid for the cathode it purchased from third parties was set according to a base price of the Comex month average as well as a premium.

3. *Phelps Dodge Corporation*

Between 1990 and 1996, plaintiff purchased rod from Phelps Dodge Corporation. Plaintiff contracted with Phelps Dodge to toll cathode that plaintiff had obtained from third parties in exchange for scrap. Phelps Dodge owned and operated mines and smelters in the United States, as well as an electrolytic refinery and rod mill in El Paso, Texas, and a rod mill in Norwich, Connecticut. Approximately 67% of the rod that plaintiff purchased from Phelps Dodge came from the Norwich rod mill; the remainder came from the El Paso rod mill.

Although Phelps Dodge is an integrated producer, it also made purchases from third parties of substantial amounts of copper that it used to make the cathode and rod it sold to customers such as plaintiff. Between 1990 and 1996, Phelps Dodge bought concentrate from a number of third parties, including Asarco, Cyprus and traders, for use in its smelters (both wholly owned and partially owned). Phelps Dodge acquired concentrate from 25 mines, three of which it wholly owned, six of which it partially owned and 16 in which it had no ownership interest. The concentrate Phelps Dodge purchased from third parties was incorporated into its manufacturing process and used to make cathode and rod at its El

Paso refinery and rod mill. Like other integrated producers, Phelps Dodge purchased concentrate from third parties because its mines did not produce sufficient quantities of concentrate to enable it to operate the mines at optimal capacity. From time to time it purchased scrap for processing in its smelters. Phelps Dodge also bought and sold anode that it processed at the El Paso refinery for cathode. The anode and blister it purchased from third party producers for its El Paso refinery originated from 13 smelters, one of which Phelps Dodge wholly owned, three of which it partially owned and nine in which it had no ownership interest.

Twelve percent of the copper Phelps Dodge used in its El Paso refinery to create cathode came from sources in which Phelps Dodge had no ownership interest. Only 16% of the copper it processed came from wholly owned facilities. Between 1992 and 1996, Phelps Dodge purchased more than 192,000,000 pounds of blister and 37,000,000 pounds of scrap for its El Paso operations. Between 1990 and 1996, Phelps Dodge purchased more than 750,000,000 million pounds of cathode from other producers and traders for use in its Norwich rod mill. It was more cost-effective to purchase third party cathode for the Norwich facility than to ship cathode from Texas to Connecticut. During this same period, Phelps Dodge purchased more than 65 000,000 pounds of cathode for use at its El Paso rod mill. The prices Phelps Dodge paid for cathode, concentrate, blister, anode and scrap were set with reference to Comex or the London Metal Exchange.

4. *Cyrus Copper Marketing Corporation*

In 1995, plaintiff purchased 616,651 pounds of copper from Cyprus Copper Marketing Corporation. This was less than one-quarter of one percent of the copper plain-

tiff purchased between 1994 and 1996. Cyprus purchased a small amount of concentrate from third parties for use in its refining operations. Beginning in 1995 or 1996, it also purchased cathode from third parties.

5. *Minemet, Inc. and Pechiney World Trade USA, Inc.*

Between 1990 and 1996, plaintiff purchased cathode and rod from Minemet, Inc. and Pechiney World Trade USA, Inc. (Pechiney acquired the assets of Minemet in 1994.) Pechiney and Minemet were trading companies that did not own mines, concentrators, smelters or refineries. All of the copper they sold to plaintiff had been purchased from third parties. Some or all of the rod that plaintiff purchased from Minemet and Pechiney had been fabricated by Westinghouse. Minemet and Pechiney paid Westinghouse for the cathode that was in the rod sold to plaintiff, plus a fee for fabricating the rod. Westinghouse purchased the cathode from third parties. Between 1990 and 1996, Pechiney and Minemet bought and sold various forms of physical copper, including copper ore, concentrate, blister, cathode, rod and scrap from and to producers, traders and semi-fabricators, including other companies that sold copper to plaintiff such as Asarco, Magma, Gerald Metals, Southwire, Westinghouse and AmRod.

6. *Gerald Metals, Inc.*

Between 1990 and 1996, plaintiff engaged in copper-related transactions with Gerald Metals, Inc. Gerald was an international trader of copper that bought and sold copper concentrate, anodes, blister, cathode and scrap from a number of companies, including Asarco, Magma, Kennecott, Essex Group, Phelps Dodge and Pechiney. The prices of the purchases and sales were set with reference to either the Comex or the London Metal

Exchange. Gerald did not own any mines, concentrators, smelters or refineries. Any copper it sold to plaintiff had been purchased previously from third parties.

From 1990 until the middle of 1993, plaintiff sold scrap to Gerald. Generally, plaintiff received cash in exchange for the cash; on occasion, Gerald supplied plaintiff with cathode or rod. After mid-1993, plaintiff usually received cathode from Gerald in exchange for scrap and arranged with Gerald for the cathode to be sent to a rod mill where it was fabricated into copper rod.

7. *Traders*

Between 1990 and 1993, plaintiff purchased copper from Barclays Metals, Deek International, Elders Raw Materials, Mitsubishi Materials (America) and Prudential Bache. All of these companies were trading companies that bought copper from third parties and resold that copper to third parties. All of the copper that these trading companies sold to plaintiff would have been purchased by them from third parties. Plaintiff's purchases from Mitsubishi and some of its purchases from Barclays consisted of purchases of cathode that plaintiff resold at a profit to traders.

8. *Semi-fabricators*

Between 1990 and 1996, plaintiff purchased rod from AmRod Corporation, a semi-fabricator. Plaintiff used AmRod to toll cathode that plaintiff obtained from third parties. AmRod owned a rod mill in which it fabricated cathode into rod. It did not own any mines, concentrators, smelters or refineries. All the cathode AmRod used to make rod was purchased from third parties, including Noranda, Asarco, Codelco, Kennecott, Gerald Metals and Minemet, at prices set with reference to Comex.

Between 1990 and 1996, plaintiff purchased rod from Southwire Company, a semi-fabricator. (Plaintiff had some tolling arrangements with the company as well.) Southwire owned and operated a rod mill and wire mill, as well as facilities to convert copper scrap that it obtained from scrap traders into cathode that was then fabricated into rod. It did not own or operate any mines or concentrators. It purchased cathode from producers and traders, including Asarco, Gerald, Pechiney and Minemet. Occasionally, it bought cathode from sources in Chile and Peru. Most of the cathode it purchased or made from scrap was converted into rod. Also, Southwire sold cathode to third parties, including manufacturers and traders. The prices at which it purchased and sold cathode were set by reference to either Comex or the London Metal Exchange. All of the copper rod Southwire fabricated was made from copper it had obtained from third parties. Southwire tolled scrap copper obtained from plaintiff into rod. Approximately 15% of the rod plaintiff received from Southwire came from scrap supplied by plaintiff.

D. *Copper Sources*

Copper is fungible and loses its identity as it is processed, refined and fabricated into rod, making it impossible to determine the source of the copper in any particular pound of cathode or rod. Magma, Phelps Dodge, Asarco, Pechiney, AmRod and Westinghouse are unable to trace the sources of particular copper sold to plaintiff or fabricated into a particular pound of cathode or rod.

E. *Hedging*

Participants in the physical copper market who contract to buy and sell copper are exposed to the risk that price fluctuations will reduce the value of their copper. Purchasers are exposed to the risk that copper prices will decline before they sell their copper. Parties who agree to sell copper at a given price at a future date are exposed to the risk that copper prices will increase above the contracted price. To protect against the risk of price fluctuations, producers, traders and semi-fabricators routinely use the futures markets (Comex or the London Metal Exchange) to hedge their physical obligations and shift their price risk to their counterparts in the market. All but one of plaintiff's suppliers hedged all or part of their physical obligations.

Gerald, Pechiney and Minemet managed their price risk by hedging on Comex or the London Metal Exchange. AmRod managed its price risk by hedging on Comex. Southwire managed its price risk for some of its transactions, including all forward priced sales, by hedging on Comex. Magma managed its forward priced sales by hedging on Comex or the London Metal Exchange. Asarco used a variety of hedging strategies: it hedged its future physical production to establish a floor price for that production; it hedged its monthly physical obligations to balance its books (selling copper futures contracts, for example, in months in which it had sold less copper than it had purchased); and it hedged sales transactions with customers when those customers forward priced or placed an order for a future date at a fixed price. In these instances, Asarco offset the sale with a futures contract on Comex.

Phelps Dodge regularly hedged its physical copper obligations by buying and selling futures contracts on Comex in order to lay off its price risk onto the market.

In situations in which a Phelps Dodge customer forward priced one month into the future, Phelps Dodge would sometimes hedge the sale through a back-to-back physical transaction, by simultaneously entering into an agreement to purchase that same quantity of rod at the same fixed price so as to avoid any price risk.

The purpose of all the hedging strategies is to protect the hedger from price fluctuations by transferring that risk to participants in the futures market.

Plaintiff used copper rod to manufacture building wire and other copper products. Because the price of copper accounted for roughly 80% of plaintiff's manufacturing costs, the price and availability of copper would have had a significant effect on plaintiff's production costs and sales prices. The cost of building wire closely follows the copper market. Comex was the overriding factor that affected the market price of plaintiff's copper-end products on a day-to-day basis.

F. *Direct Purchases from Defendants*

Between 1990 and 1996, plaintiff never purchased any copper from any of the defendants, with the exception of a series of transactions with defendant Sumitomo Corporation of America in 1992. These transactions took the form of simultaneous purchases and sales and were made to enable Sumitomo to obtain copper in more favorable locations. They involved fewer than 11,000,000 pounds of copper and less than $12,000,000. The documents reflecting the transactions do not show which party received more money as a net result of the transactions.

G. *Other Litigation*

In 1996, two lawsuits were filed in California state court arising out of the alleged manipulation of the price of copper between January 1, 1993 and July 1, 1996, by

defendants Sumitomo Corporation of America, Global Metals and Minerals and Campbell. The suits were filed as class actions on behalf of all persons who had purchased copper products, defined to include concentrate, blister, anode and cathode, between January 1, 1993 and July 1, 1996, and who at the time of the purchases resided in a group of defined states, purchased copper products from persons residing in one of those states or purchased any copper for delivery in one of those states. The actions were settled. In connection with the settlement, BHP/Magma, Asarco and Gerald filed proofs of claim that were allowed in the following amounts: 1) BHP/Magma, $1,167,298,575.00; 2) Asarco, $543,128,847.00; and 3) Gerald, $95,790,545.61. BHP/Magma received a payment from the settlement fund of $1,768,148.22; Asarco received $822,696.37; and Gerald received $145,097.31.

In 1996, a lawsuit was filed by futures traders in the United States District Court for the Southern District of New York arising out of the alleged manipulation of the price of copper futures and options contracts between June 20, 1990 and June 19, 1996, by defendants Sumitomo Corporation of America, Global Metals and Minerals and David Campbell.

OPINION

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides a federal cause of action to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." Plaintiff contends that it fits within the provisions of this statute: it has suffered injury to its business of manufacturing building wire (by having to pay higher prices for the copper cathode and copper rod it purchased) as a result of defendants' violation of section 1 of the Sherman Act, 15 U.S.C. § 1,

which forbids conspiracy in restraint of trade. A review of the text of § 15 would suggest that plaintiff is correct. In reality, however, the language of the Clayton Act is not as broad as it seems. For practical reasons, it has been narrowed by the Supreme Court in an effort to effectuate the congressional intent that the act be construed in light of its common law background. *See Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 531 (1983) (quoting Senator Sherman's statement that proposed law "does not announce a new principle of law, but applies old and well recognized principles of the common-law to the complicated jurisdiction of our State and Federal Government") (21 Cong. Rec. 2456). *See also National Society of Professional Engineers v. United States*, 435 U.S. 679, 687-88 (1978): "Congress, however, did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that [Congress] expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition. " *See also Blue Shield of Virginia v. McCready*, 457 U.S. 465, 477 (1982) ("It is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property").

After 111 years of interpretation, certain principles have evolved to define antitrust standing, which is distinct from Article III standing. In both instances, the plaintiff must plead an injury in fact but in antitrust cases, "the court must make the further determination whether the plaintiff is a proper party to bring a private antitrust action." *Associated General Contractors*, 459 U.S. at 535 n. 31. Plaintiffs must show not only that they

have suffered the type of injury that the antitrust laws were intended to prevent and that their injuries are a result of defendant's unlawful conduct, *see*, e.g., *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977), but that they are in the best position to vindicate the alleged violation because their injuries are neither indirect nor secondary in nature. *See Associated General Contractors*, 459 U.S. at 537-45. In determining which plaintiffs are best placed to sue, courts consider the causal connection between the alleged antitrust violation and the harm to the plaintiff and the defendant's intent to cause the harm; whether the injury was of a type the laws were designed to prevent; the directness or indirectness of the alleged injury; the existence of more direct victims who can assert a claim against the wrongdoer; the nature of the plaintiff's injuries (whether they are speculative or determinable); and the risk of duplicative recoveries or complex apportionment of damages. *See id.*

Application of these factors to plaintiff's situation leads ineluctably to the conclusion that plaintiff is not in a position to sue these defendants for antitrust violations. The question is not a close one, although plaintiff makes a modest effort to characterize it as one. As the undisputed facts show, it is only in the most generalized fashion that the manipulation of the futures market can be said to affect the cash markets. That there is *some* effect is undisputed. What that effect might be in any particular transaction is another matter altogether. The number of exchange-based pricing formulas, the laws of supply and demand and the premiums and discounts that reflect supply and demand make it exceedingly difficult, if not impossible, to trace the influence of the futures prices. The physical copper market and the copper futures markets do not move in lockstep. As a conse-

quence, there is only an attenuated causal connection between the harm to plaintiff and defendants' violation; the alleged injury is not a direct one.

Moreover, plaintiff's theory of recovery rests on extraordinarily complex damage computations and a high risk of duplicative recovery, in violation of the principles espoused by the Supreme Court in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), and *Hanover Shoe, Inc. v. United Shoe Machinery Corp*, 392 U.S. 481 (1968). In *Illinois Brick*, the defendants were manufacturers of concrete block that had engaged in price fixing. Plaintiffs were governmental entities that had purchased buildings built by general contractors, who in turn had bought the block from the manufacturers; plaintiffs were not the direct purchasers of the overly expensive concrete blocks, as they might have been under a different building arrangement. The question for the Court was whether indirect purchasers such as plaintiffs should be able to sue in such a situation. Earlier, in *Hanover Shoe*, the Court had held that a manufacturer charged with violating the antitrust laws could not use as a defense the fact that the plaintiff customer had passed on illegal overcharges to its own customers. As the Court noted in *Illinois Brick*, in rejecting the passing on defense in *Hanover Shoe*, it had been unwilling "to complicate treble-damages actions with attempts to trace the effects of the overcharge on the purchaser's prices, sales, costs, and profits, and of showing that these variables would have behaved differently without the overcharge. " *Illinois Brick*, 431 U.S. at 725. In addition, the Court had been concerned that "unless direct purchasers were allowed to sue for the portion of the overcharge arguably passed on to indirect purchasers, antitrust violators 'would retain the fruits of their illegality' because indirect purchasers 'would have only a tiny stake in the law-

suit' and hence little incentive to sue." *Id.* at 725-26 (quoting *Hanover Shoe*, 391 U.S. at 494).

Illinois Brick forced the Court to decide two questions: whether it should apply the rule announced in *Hanover Shoe* equally to plaintiffs and defendants and whether it had reached the right conclusion in that case when it held that it was only the overcharged direct purchaser that was the party "injured in his business and property" within the meaning of § 4 of the Clayton Act, rather than others in the chain of manufacture and distribution. It answered yes to both questions. The rule announced in *Hanover Shoe* operated to bar plaintiffs from using the passing on theory offensively, that is, by arguing that they had been injured by the general contractors' passing on to them of the overcharge on the concrete blocks, and the rule enhanced the effectiveness of the antitrust treble-damages action by precluding indirect purchasers down the distribution chain from suing to recover the fraction of the overcharge allegedly passed on to them. *See Illinois Brick*, 431 U.S. at 728-29.

Two policy concerns animated the Court's decision in *Illinois Brick:* the transformation of "treble-damages actions into massive multiparty litigations involving many levels of distribution and including large classes of ultimate consumers remote from the defendant," *see id.* at 745, and the enormity of the task that courts would face in attempting to determine damages incurred at each level of distribution. *See* Phillip E. Areeda & Herbert Hovenkamp, 11 *Antitrust Law* ¶ 346c (Rev. ed. 1995) ("The point to be drawn from *Illinois Brick* and its predecessor, *Hanover Shoe*, is the practical one that the effectiveness of the antitrust remedy would be undercut if the task of tracing antitrust injuries and determining damages becomes overly complex.").

Even when the damages calculation is not complex, the Court has refused to waver from its position that the purchaser that buys directly from the alleged antitrust violator is the only party that can assert antitrust standing. In *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199 (1990), for example, the Court refused to recognize antitrust standing for customers of utility companies, despite the fact the utility companies had passed on to those customers 100% of the alleged overcharges for gas. The Court acknowledged that the economic assumptions underlying *Illinois Brick* might not apply with equal force in all cases and might even be disproved in a particular case, but confirmed its belief that "ample justification exists for our stated decision not to 'carve out exceptions to the [direct purchaser] rule for particular types of markets.' *Illinois Brick*, 431 U.S. at 744. The possibility of allowing an exception, even in meritorious circumstances, would undermine the rule." *Utilicorp United*, 497 U.S. at 216-17.

Plaintiff Ocean View has not alleged that it bought more than a relatively tiny percentage of cooper cathode or copper rod from one of the defendants. It has adopted a different approach, which is to argue that the wrongdoing of the defendants had as its object the manipulation of prices on the futures market that served as the index for prices on the physical market. Because copper cathode is the only form of copper that is the subject of futures contracts and because defendants concentrated their efforts to manipulate the physical market for copper by stockpiling huge supplies of copper cathode and not raw copper or concentrate, plaintiff argues that the relevant "market" for antitrust purposes is the copper cathode market. This market definition is purposeful. By limiting the antitrust focus to the copper cathode market, plaintiff can call itself the "first purchaser" in the mar-

ket. As the first purchaser, it contends, it was directly injured by the manipulation of prices for copper cathode and thus has standing to sue any supplier that made its own cathode. It avoids the *Illinois Brick* concern of duplicative recoveries because it is the first entity to pay an overcharge tied to copper cathode prices, as contrasted with purchasers of pre-cathode copper. Each time that plaintiff bought cathode or rod in the relevant market during the period of defendants' manipulation, it had to pay a higher price for copper cathode or rod than it would have paid had it not been for defendants' manipulation of the futures markets in copper cathode.

Plaintiff agrees that it cannot be deemed the first purchaser when it bought cathode from suppliers that had not made the cathode themselves. In that circumstance, it concedes, its purchase of the cathode would not be the first time the cathode had been sold; therefore, plaintiff would not be entitled to damages as the first purchaser.

Plaintiff maintains that the first purchaser of a product at a manipulated price is the equivalent of a direct purchaser because it is the first to feel the effects of the conspirators' efforts to manipulate the prices of the product. Such a purchaser is best positioned to assert antitrust claims resulting from the conspirators' actions. Moreover, plaintiff argues, it makes no difference to the assertion of standing that it would be difficult to prove exactly how much of the cathode plaintiff purchased had not been the subject of a previous purchase by the supplier because the quantities can be estimated. Plaintiff does not say exactly how the estimate would be made. Presumably, plaintiff would determine for any given year (or other time period) how much cathode Supplier A made and how much Supplier A bought from other suppliers and then apply the percentage of purchased cathode to the percentage of cathode Supplier A sold to

plaintiff in that year. This would produce an estimate of the amount of cathode plaintiff bought from Supplier A in a given year that had never been purchased before. Plaintiff admits that it has no evidence at the present time that would enable it to make these estimates but denies that this is any problem. Its discovery to date has been limited to standing only; when the discovery limits are lifted, it says, it will subpoena the evidence it needs from its suppliers.

The flaws in plaintiff's theory are manifold. First, there is no support in the case law for plaintiff's theory of the first purchaser as the equivalent of the direct purchaser under *Illinois Brick*. In all probability, plaintiff is trying to adapt its claim to the concept of "umbrella standing" relied upon in *Sanner v. Board of Trade*, 62 F.3d 918 (7th Cir. 1995). In *Sanner*, individual soybean farmers sued the Chicago Board of Trade, alleging that the board had violated the antitrust laws by passing a regulation requiring holders of long term positions in soybean futures to liquidate them according to a specified schedule, as a means of bringing down the cash price of soybeans. The farmers alleged that they had suffered injury when they tried to sell their soybean crops because of the board's action, which had depressed the price of soybeans. The court of appeals held that the district court had acted prematurely in dismissing the farmers' claim. The district court had held that the cash and futures markets were distinct markets; the farmers had not participated in the futures markets; the causal link between the cash value of soybeans and the manipulation of the futures market was too attenuated; the nature of the damages was too speculative; and other persons might in a better position to sue. The court of appeals disagreed with these holdings, finding the farmers' allegations sufficient to withstand a motion to dismiss. As to

the alleged distinctions between the cash and futures markets, the farmers had alleged both that the board had acted with the intent of prompting a downturn in the cash market for soybeans and that the two markets moved in lockstep because they involved the same commodities to be delivered immediately or sometime in the future. As to damages, the court of appeals was satisfied that the damages calculation would not be particularly difficult: "Both parties can offer proof concerning the extent to which a decline in the cash market price of soybeans (an objectively verifiable matter) was or was not attributable to the liquidation of positions prompted by the [board of trade's] Resolution." *Id.* at 930.

Sanner does not provide support for plaintiff's assertion of standing, now that the record has been developed and the case is before the court on motions for summary judgment. *Sanner* was decided on a motion to dismiss. At that stage, it was proper to accept the plaintiff farmers' allegation that the cash and futures soybean markets moved in lockstep. (For the same reason, it was proper to accept plaintiff's allegation in this case that "a manipulation of the price of copper futures on the COMEX and/or the LME would directly and predictably correlate with a manipulation of copper prices on the cash market," Plt.'s Am. Comp L, dkt. # 155, ¶21, when deciding defendants' motion to dismiss the complaint. *See In re Copper Antitrust Litigation*, 98 F. Supp. 2d at 1050.) It was evident, however, that the plaintiffs in *Sanner* would be unable to succeed on their claim if they could not prove their allegations about the way in which the markets worked. In this case, the undisputed facts show that the relationship between the futures market and the physical market is not direct and predictable; many factors other than the futures prices enter into the price calculations for physical copper. *Cf. In re Beef Industry*

Antitrust Litigation, 710 F.2d 216 (5th Cir. 1983) (on motion to dismiss, allegations of "rigid formula pricing" tied to daily reports of beef prices sufficient to proceed; on motion for summary judgment, defendants' "overwhelming proof," *id.* at 219, that factors other than daily price reports influenced beef pricing and plaintiffs' failure to raise genuine issue in response supported grant of summary judgment for defendants); *In re Coordinated Pretrial Proceedings* in *Petroleum Products Antitrust Litigation*, 691 F.2d 1335 (9th Cir. 1982) (risk of double recovery and unacceptable level of speculation and complexity of damages calculation doomed retail gasoline purchasers' assertion of umbrella standing when purchasers bought from non-defendants).

It is telling that plaintiff ignores the obvious problem of characterizing the market as a cathode market, when the undisputed facts show that rod is made from cathode. Therefore, any time plaintiff bought rod rather than tolling it, it was buying previously purchased cathode that had been turned into rod. Because most of its purchases were of rod plaintiff's "cathode market" theory is not even relevant to its situation.

Even if, as plaintiff argues, it is entitled to sue because it was injured directly by defendants' antitrust violations on each occasion that it bought copper cathode or rod at a price tied to the metals exchanges, it must show that allowing it to do so would not result in duplicative recovery or an overly complex determination of damages. It cannot make such a showing. Plaintiff has the initial challenge of showing that it was the first purchaser of copper cathode. As it has conceded, in many instances it could not make this showing. It bought regularly from suppliers such as traders and semi-fabricators that had to purchase copper cathode for sale to

plaintiff because they had no facilities for making their own.

Even when plaintiff bought from producers, it could not be sure that the producers were selling their own product or purchased product. Plaintiff has no documentation to prove the source of any copper cathode it purchased or any evidence from which it might estimate what percentage of the cathode it purchased had been purchased previously. It is no answer for it to say that such evidence can be obtained in the future or that it need not be produced at this time because it relates only to damages. The missing evidence is critical to plaintiff's assertion of standing, since among the elements of antitrust standing it would have to prove at trial are that a damage calculation would not be impossibly complex *and* that it would be possible to determine plaintiff's damages without duplicating the damages of any other potential plaintiff. On a motion for summary judgment, the party opposing the motion must reveal its hand. It must adduce evidence sufficient to create a genuine issue as to each material fact; it cannot resist the motion simply by suggesting it will have controverting evidence at trial. *See*, *Schacht v. Wisconsin Dept. of Corrections*, 175 F.3d 497, 504 (7th Cir. 1999).

Of course, this missing evidence is only one of many problems plaintiff has. Even with the evidence that would allow it to estimate what percentage of copper cathode it bought "first," estimations would not solve the more intractable problem of determining the overcharge that plaintiff paid in any given transaction. As I understand plaintiff's theory of computing damages, plaintiff would begin with an estimate of the percentage of copper cathode and rod it bought in a given time period and then attempt to disentangle the factors that went into the purchase price of that copper to determine the portion

that was the result of illegal manipulation. If this is the damage calculation process, it leaves unanswered a myriad of questions. What price would plaintiff use as its starting point? Would it take an average price paid for all the copper over the time period (since it could not know as to any given day or any particular transaction whether the cathode it was buying had been purchased previously)? If so, how could it trace an average price to any indexed price, when the indexed prices on the Comex alone change from day to day and include 24 variations each day? The difficulty, if not the absurdity, of trying to calculate damages is obvious.

Not only is the damage calculation the kind that *Illinois Brick* and *Hanover Shoe* have ruled inimical to the policies underlying the antitrust laws, any damages awarded to plaintiff would inevitably be duplicative of damages due others. There is no way to determine which cathode should be considered a "first purchase." Because there is not, there is no way to determine whether another player in the copper market might be entitled to damages for having paid a higher price on the same copper. There is no simple or straightforward way to analyze a particular purchase price and determine whether it represents an overcharge attributable to defendants' manipulation or the seller's passing on of the original overcharge, with perhaps a second overcharge resulting from indexing the second sale to the futures market. As in *In re Copper Antitrust Litigation (Loeb Industries v. Sumitomo Corp.)*, 196 F.R.D. 348, 357 (W.D. Wis. 2000), "the complexities of the copper transactions in which plaintiffs engaged made it . . . difficult to determine whether they . . . were injured directly by defendants' antitrust violations and not just by the passing on of prior overcharges tied to the futures market."

Sanner, 62 F.3d 918, provides no help to plaintiff in this regard. In *Sanner*, the plaintiffs were in fact the first line of persons injured: presumably they had grown the soybeans that were the subject of the price manipulation. There was no evidence that they were selling soybeans they had purchased from others or that they were re-selling beans to other farmers (at indexed prices) who were also seeking damages for the price manipulation.

The availability of hedging and its wide use are other reasons to find that plaintiff was not the first to incur injury because of manipulation of the futures prices for cathode. (It is worth noting that in *Sanner*, the court never discussed the possibility of hedging and its effect on plaintiffs' assertion of umbrella standing, although it is a common practice in all commodities markets.) The routine use of hedging by suppliers of cathode and other copper products means that most of the copper that was sold to plaintiff had been the subject of a hedge. Assuming that plaintiff's allegations are correct and that defendants were manipulating the futures markets throughout this period, the market price at which a supplier hedged its future sales of copper would have been an artificial one that caused the supplier injury long before it shipped copper to plaintiff. To the extent that the supplier passed on the artificial price, plaintiff's damages would be duplicative of its supplier's, who could assert its own claim for overcharges on the same copper. In fact, several of plaintiff's suppliers have done just that in the lawsuits filed in California against defendants Sumitomo Corporation of America, Campbell and Global and have recovered money on their claims. Plaintiff argues that the California lawsuits are separate matters, based on different claims and brought under a wholly different law that allows recovery up and down the distribution chain. Whether or not plaintiff is correct about the lack

of overlap between this suit and the California ones, the fact remains that allowing plaintiff to sue for damages that might have been incurred by others higher up the distribution chain violates the *Illinois Brick* and *Hanover Shoe* rule denying standing in situations in which there is a serious risk of multiple liability. More important, the assertion underscores the difficulty of unraveling the tangled skein of copper transactions to determine the source of the copper and how the purchase price was derived.

At the outset of its brief, plaintiff expressed concern that if it were not granted standing, no potential plaintiffs could sue unless they "could prove to a mathematical certainty that whatever copper cathode they purchased contained only copper that their vendor itself mined," Plt.'s Mem. in Response, dkt. #384, at 1, and that if defendants' view is adopted by the court, defendants would have found "the perfect, victimless, crime, or at the very least, a crime whose victims are without remedy." *Id.* at 4. It is true that courts are to take into consideration the existence or non-existence of more direct victims who can assert a claim against a wrongdoer, *see Associated General Contractors*, 459 U.S. at 540-41, but that is only one of the factors to be weighed in the balance. In itself, it is not sufficient to provide standing if the other factors do not point toward the same conclusion. In any event, other plaintiffs do exist. They include not only the entities who are part of the class action in federal court in New York, but presumably those who bought copper directly from defendants at a supra-competitive price.

Plaintiff is not suing to recover on that basis, even though it did buy copper directly from defendant Sumitomo Corporation of America at one period in 1992. It

has never based any demand for relief on direct sales from Sumitomo.

I conclude that plaintiff has not adduced evidence sufficient to create a genuine issue that it has antitrust standing to sue defendants. Therefore, I will grant defendants' motions for summary judgment and deny plaintiff's. With this determination, it is unnecessary to address the Morgan defendants' motion to dismiss plaintiff's complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6) on the ground that plaintiff failed to allege that these defendants participated directly in any transaction in violation of the antitrust laws.

Plaintiff's state law claim under Rhode Island law fails for the same reasons as the federal law claim because the Rhode Island Antitrust Act is "construed in harmony with judicial interpretations of comparable federal antitrust statutes insofar as practicable, except where provisions of this chapter are expressly contrary to applicable federal provisions as construed." R.I. Gen. Laws § 6-36-2(b). Nothing in the Rhode Island antitrust laws is contrary to the Supreme Court's interpretation of the Sherman Act in *Illinois Brick*, 431 U.S. 720 (1977).

Plaintiff has asked that its state law claim be dismissed without prejudice but it has offered no argument to support its request or cited any provision of Rhode Island case law or statutes that would suggest that the state's laws are construed differently from federal laws with respect to antitrust standing. There is no reason to allow this matter to proceed in state court when there is no apparent basis on which it could succeed.

Before ending this opinion, I want to comment on the excellence of the briefing and the presentation of the proposed findings of fact. It is not often that courts have the pleasure of working with such well prepared materials. Counsel are to be commended for their work.

ORDER

IT IS ORDERED that the motion for summary judgment of plaintiff Ocean View Capital, Inc., f/k/a Triangle Wire & Cable, Inc. is DENIED; the motions for summary judgment filed by defendants Sumitomo Corporation of America, Sumitomo Corporation, Sumitomo Futures Corporation, Global Minerals and Metals Corporation, David Campbell, Credit Lyonnais Rouse, J.P. Morgan & Co., Incorporated, and Morgan Guaranty Trust Company of New York are GRANTED on all of plaintiff's federal and state claims; and the motion to dismiss filed by defendants J.P. Morgan & Co., Incorporated and Morgan Guaranty Trust Company of New York is DENIED as moot. The clerk of court is directed to enter judgment for all defendants in cases 99-C-0801-C and 00-C-0528-C and close these cases.

Entered this 23rd day of July, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge